United States Court of Appeals
for the Second Circuit

EXHIBITS

77-6015

DELAYS IN SOCIAL SECURITY APPEALS

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HEARINGS
BEFORE THE
SUBCOMMITTEE ON SOCIAL SECURITY
OF THE
COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS
FIRST SESSION

SEPTEMBER 19, 26; OCTOBER 3 AND 20, 1975

Printed for the use of the Committee on Ways and Means

Exhibit B

White v. Mathews # 77-6015

DELAYS IN SOCIAL SECURITY APPEALS

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DELAYS IN SOCIAL SECURITY APPEALS

FRIDAY, SEPTEMBER 19, 1975

House of Representatives,
Subcommittee on Social Security,
Committee on Ways and Means,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m. in room EF-100, the Capitol, Hon. James A. Burke (chairman of the subcommittee) presiding.

Mr. Burke. The subcommittee will come to order.

The subject matter before the subcommittee is the large buildup of appeals on applications for social security benefits, particularly disability benefits. The situation has become quite critical and has caused lengthy delays in processing claims. A recent report showed that the average time for processing disability claims involving an administrative appeal going to hearing is around a year and a half. Every Member of Congress has had cases of this sort brought to his attention.

The issues that will be discussed are complex and technical. They will include the application of the Administrative Procedure Act to social security hearings and appeals, the functions performed by the State agencies that make determinations of disability and steps that are being taken and those that could be taken to expedite and improve the entire process of determining disability under the social security and SSI programs.

While we are very concerned because of the delays involved in processing these appeals, we must be equally concerned with the quality of adjudication. There are clear indications that more cases are being reversed at all levels of appeal. This could be adding significantly to the cost of the disability insurance program. We must be very careful therefore not to take any steps to bring the "appeals crisis" under control at the expense of lowering quality of decisions rendered in individual cases. We don't want to cause a big paper shuffle that further increases the financial deficit of the program, and fails to provide equal justice to applicants.

We have 3 days of hearings scheduled, as described in a subcommittee press release which I will include in the record.

Also I will include the committee print, "Background Material on Social Security Hearings and Appeals."

[The material follows:]

[Press release No. 5 of Thursday, Aug. 28, 1975]

CHAIRMAN JAMES A. BURKE (D-MASS.), SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS, ANNOUNCES PUBLIC HEARINGS COMMENCING SEPTEMBER 19, 1975, ON THE PROBLEMS OF DELAY IN THE SOCIAL SECURITY APPEALS PROCESS.

Chairman James A. Burke (D. Mass.), Subcommittee on Social Security of the Committee on Ways and Means, [illegible] announced the scheduling of a limited series of hearings focusing on the large backlog of hearings cases pending before the Social Security Administration. This situation is causing claimants to have to wait long periods of time [illegible]eir rights can be adjudicated by a hearings officer as required by the so[illegible] law.

The Subcommittee hear[illegible] held the last two Fridays of September (September 19 and 26, 197[illegible] first Friday of October (October 3, 1975), beginning at 10:00 a.m. on ea[illegible]. The hearings will be held in Room EF-100 of the Capitol Building on September 19 and 26, and in the Caucus Room, Room 345 of the Cannon House Office Building, on October 3.

In the hearing of September 19th, the Subcommittee will hear from governmental witnesses representing the Social Security Administration (particularly the Bureau of Hearings and Appeals) and the Civil Service Commission. In the morning of September 26th, an invited panel of experts in the appeals process and administrative law will discuss the advantages and disadvantages of having the Administrative Procedure Act apply to Social Security Act cases and its relevance to the backlog. Also the ramifications on the social security appeals process of the *Kelley* vs. *Goldberg* decision will be discussed. On the afternoon of September 26th and continuing on October 3rd, the Subcommittee will hear testimony from interested organizations, including representatives of various associations of Administrative Law Judges and hearing examiners and State disability determination agencies, and from other organizations and individuals who request to be heard.

DETAILS FOR SUBMISSION OF REQUESTS TO BE HEARD

Cutoff Date for Requests to be Heard: Requests to be heard must be received by the Committee no later than the *close of business Thursday, September 18, 1975.* Requests should be addressed to John M. Martin, Jr., Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515, telephone: (202) 225-3625. Notification as to the witness' scheduled date of appearance will be made as promptly as possible after the cutoff date. *Once the witness has been advised of his date of appearance, it is not possible for this date to be changed.* If a witness finds that he cannot appear on that day, he may wish to either substitute another spokesman in his stead or file a written statement for the record of the hearings in lieu of a personal appearance, because under no circumstances will the date of an appearance be changed.

Due to the limited time available for this hearing, it may be necessary to allocate the amount of time available to each witness for the presentation of his direct oral testimony. If so, it will be mandatory on all witnessses not to exceed the time allocated for this purpose. If the witness has a more detailed statement, it will be reviewed by the Subcommittee and will be included in the record of the hearing.

Requests to be heard must contain the following information:

1. The name, full address and capacity in which the witness will appear.
2. The list of persons or organizations the witness represents and in the case of associations and organizations, their address or addresses, their total membership, and, where possible, a membership list.
3. If a witness wishes to make a statement on his own behalf, he must still nevertheless indicate whether he has any specific clients who have an interest in the subject, or in the alternative, he must indicate that he does not represent any clients having an interest in the subject he will be discussing.
4. A topical outline or summary of the comments and recommendations which the witness proposes to make.

If it is necessary to allocate time to each witness, this amount of time will be strictly adhered to. Witnesses are urged to verbally summarize their statements; the complete statements submitted to the Subcommittee will be included in the printed record of the hearing and will be reviewed and fully considered by the members of the Subcommittee.

It is requested that persons scheduled to appear before the Subcommittee to testify at this hearing submit 50 copies of their prepared statements to the Committee office no later than 24 hours prior to their scheduled appearance. An additional 50 copies may be furnished for distribution to the press and the interested public on the date of appearance.

Any interested person or organization may, in lieu of a personal appearance, file a written statement for inclusion in the printed record of the hearing. For this purpose, statements should be submitted in triplicate by the close of business Friday, Ocober 3, 1975. Additional copies may be furnished for distribution to the press and the interested public if submitted to the Subcommittee during the course of the public hearing

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94th Congress
1st Session

COMMITTEE PRINT

SUBCOMMITTEE ON SOCIAL SECURITY
OF THE
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

Background Material on Social Security Hearings and Appeals

SEPTEMBER 17, 1975

Prepared by the staff of the Subcommittee on Social Security

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

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WMCP: 94-79

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BACKGROUND MATERIAL ON SOCIAL SECURITY HEARINGS AND APPEALS

Introduction

This print is designed to provide Members with background information for the hearings which will be held before the Subcommittee on Social Security on September 19 and 26 and on October 3, 1975. The information and discussion of issues up-dates and expands upon the material on the social security appeals process contained in the "Committee Staff Report on the Disability Insurance Program," July 1974 (hereinafter called the Committee Staff Report). In its findings and recommendation section the Committee Staff Report stated:

> In view of the "appeals crisis" which will grow in coming months, the Committee may wish to reexamine the complex structure of the appeals procedures and attempt to obtain answers to the following difficult questions: Can the Appeals Council be restructured in order to provide more definitive and supportable administrative determinations? Can the system continue to provide both a full administrative reconsideration and a hearing under the Administrative Procedure Act (APA)? Are certain of the administrative and judicial remand procedures causing undue delay for claimants? Can the District Courts withstand the flood of new cases, particularly where many of them ignore the substantial evidence rule and try the case de novo? The staff has, in a preliminary manner, examined some alternative approaches to these problems and they are presented in Part II, section D, Disability Appeals Procedure, in this document (pp. 31–44).
>
> The Civil Service Commission has interpreted the 1972 Amendments in such a manner as to exclude SSI hearings from the applicability of the APA and has decreed that the SSI "hearing examiners" must be appointed by the Secretary of HEW rather than by the Commission and classified at a lower grade than those who conduct Social Security disability hearings. The Commission's conclusion with respect to the applicability of the APA to SSI hearings is clearly contrary to the intent of the Committee and the Congress. In Part II, section F, Status of the SSI Program Under the Administrative Procedure Act (pp. 55–75), the staff makes certain recommendations in this area which are intended to make clear the Committee's intent concerning the SSI hearings procedures (page 6).

In July of 1975 Social Security Commissioner Cardwell transmitted a progress report on action directed toward the issues raised by the Committee Staff Report. The portion of this transmittal dealing with the social security appeals procedure appears in the appendix on page 19.

Attention is also called to the committee print issued August 1, 1975, entitled, "Staff Survey of the State Disability Agencies Under Social Security and SSI Programs." This survey, which is based on a questionnaire sent by the subcommittee staff to the 54 State agencies that determine disability under the social security and SSI programs, contains expressions of the views of the State agencies concerning some of the issues that will be before the subcommittee during its hearings.

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Hearings and Appeals Process in Brief

Since most of the hearings pending are in the disability area (both Social Security and SSI) the process described will be for that type of claim. The application for disability is made at the Federal social security district office where the claimant is interviewed and the sources of medical evidence are recorded. The case is then sent to the State agency which, operating under contract with the Social Security Administration, makes the initial determination of disability. If a claimant is dissatisfied with an initial denial of disability by the State agency he can request a reconsideration within 6 months of notice of denial. The reconsideration is also carried out by the State agency but by personnel other than those who made the initial determination. If upon reconsideration the claimant is again denied benefits he will be given a hearing before an administrative law judge (ALJ) providing he files a request within 6 months of notice of the denial. Under SSI this period is 30 days at both levels. (Prior to 1960 an individual could request either a hearing or a reconsideration.) If the claim is denied by the administrative law judge, the claimant has 60 days to request review by the Appeals Council. The appeals council may also, on its own motion, review a decision within 90 days of the ALJ's decision. The Appeals Council may review, affirm, modify, or reverse the decision of the ALJ or it may remand it to the ALJ for further development. The claimant is notified in writing of the final action of the Appeals Council, and is informed of his right to obtain further review by commencing a civil action within 60 days in a district court of the United States.

Issues Explored

The present "crisis" in the social security appeals process is linked to the tremendous backlog of disability hearing cases and the resultant delay that beneficiaries encounter in going through the process of exhausting their administrative [1] remedies. A recent study indicates that the average time for a disability case from application to award or final administrative denial is over a year and a half, and roughly half of this time is attributable to the hearing process. The result has been many complaints from affected parties, which engendered a letter to the chairman of the full committee from 73 Members of Congress requesting the hearings which will be held during September and October before the Subcommittee on Social Security on this subject. The appeals crisis is not new, however, and its growth has roughly paralleled the growth of the social security disability program and the addition, in recent years, of black lung appeals and the establishment of an SSI disability program. Social security retirement and survivors and medicare cases play a relatively minor role in terms of number of cases requiring hearings (see table 8 for breakdown of hearings by type of claim).

As will be seen from table 1, the median time for disability hearings has been lengthy in the past as well as in recent years.[2]

Equally important as speed of processing of cases, is the question of the quality of adjudication. The rate of reversal of initial denials of disability has become so substantial in recent years that it has been cited by the Administration as one of the reasons for the growing actuarial deficit in the disability insurance system. Moreover, questions continue to be raised as to the uniformity of decisionmaking throughout the various elements of the system.

This paper will attempt to outline some of the main issues in the appeals process. Areas covered will include the applicability of the Administrative Procedure Act (APA) to hearings under the Social Security Act so far as it affects the appointments and control of hearing officers with particular emphasis on the APA coverage for SSI hearings and the legislation that has been recently reported out by the Public Assistance Subcommittee which overrides an interpretation of the Civil Service Commission. Other areas dealt with are various mechanisms—ad hoc and otherwise—for dealing with the hearing backlog: (1) the wholesale remanding of cases to the State agencies where a hearing has been requested—a re-reconsideration (2) the institution of face-to-face contact with claimants on reconsideration by the State agency and (3) the reducing the time that a social security claimant has to appeal an adverse decision. Also under consideration is the increased use of paralegal personnel in the hearings process, a topic which was discussed in the Committee Staff Report of July 1974. Also there will be discussion of the impact of social security cases on the Federal courts and some very important pending cases before Federal courts which could greatly increase the number of appeals. In the *Eldridge* case the Supreme Court will determine the applicability of *Goldberg* v. *Kelly* to social security disability cases and conceivably require a hearing before any termination of social security benefits. The administration in its brief before the Supreme Court in the *Eldridge* case has stated that an adverse decision would require about 11,000 additional hearings a year. Finally, some of the problems of reconciling the need for speed in adjudication with uniformity and quality of adjudication will be discussed.

---

[1] A growing number of social security and black lung cases have been appealed to district courts and the median time for their disposition is over a year and increasing.

[2] During the period 1957-59 the average processing time for hearing varied between 250-300 days.

Application of the APA to Social Security Cases

The social security appeals procedure which was established in 1939 antedates the Administrative Procedure Act (APA) which was enacted in 1946. In fact, the Attorney General's committee which was primarily responsible for the form of the APA used Social Security Act procedures as a model and considered the APA "largely declaratory" of its provisions.

The Ways and Means Committee and the executive branch in past years have always assumed that social security appeals were under the APA. The Administrative Law Section of the American Bar Association recently has taken this position in a brief filed before the Supreme Court in *Richardson* v. *Perales*, (1971) 402 U.S. 410:

> The Administrative Procedure Act applies to social security cases. It permits consideration of hearsay evidence while preserving the right of cross-examination. The case before this Court can and should be decided through application of the Administrative Procedure Act.

The bar association brief stated that the APA applies in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554(a)) and hearings on social security, claims do not come under any of the six exceptions to this statutory requirement. A court of appeals had held in the *Perales* case that the APA was inapplicable on the ground that 5 U.S.C. 556(b) states that the act "does not supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other employees specifically provided for by or designated under statute." On appeal, the Supreme Court held that "we need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. * * * Hearsay, under either Act, is thus admissible up to the point of relevancy." It then held that the social security procedures comply with the due process requirements of the Constitution.

Encouraged by the Supreme Court decision to avoid taking a position on whether the APA applies and other Supreme Court decisions in recent years which have given more weight to administrative ramifications of hearing requirements, some commentators have stated that the APA should not be applied to social security cases. These recent Supreme Court cases are somewhat at odds with earlier cases such as *Wong Yang Sung*. In that case Justice Jackson refused to accord weight to the argument that an APA hearing would cause the

Government inconvenience and added expense, stating "of course it will, as it will to nearly every agency to which it is applied. But the power of the purse belongs to Congress which has determined that the price for greater fairness is not too high." *Wong Yang Sung* v. *McGrath* (1950) 339 U.S. 33.

Others, who are not so certain that their position can be sustained on legal grounds, believe that wise public policy may call for the exemption of the growing number of social welfare cases from APA coverage. Opposed to this view are those who believe APA hearing safeguards are as necessary for adjudication of individual program rights as they are for corporations affected by regulatory agency action. The panel which will appear before the subcommittee on September 26, 1975 will include administrative law experts on both sides of this issue.

Briefly, what does APA coverage mean and how does it affect the right to and nature of the hearing? A large body of case law seeking to answer these questions has developed since both the Social Security Act and the APA were enacted. The Supreme Court has held in a series of cases that the due process clause of the Constitution protects an individual from final denial of a substantial benefit without opportunity for a hearing. *Flemming* v. *Nestor*, (1960) 363 U.S. 603; *Goldberg* v. *Kelly*, (1960) 397 U.S. 603. Moreover, these cases and others have spelled out the procedural components of the hearing which must be present to meet due process requirements. Such elements as adequate notice, access to evidence, right to cross examination, right to counsel and written finding and reasons for decision, etc. Also due process requires that the person who takes evidence and makes the decision be impartial, that the trier of fact cannot be prosecutor in the same matter, and that he cannot have been involved in the matter previously as an agency staff person. These also are requirements of the APA but there are other requirements in the APA which go beyond the due process requirements. It is in the area of the qualification of the hearing officer and his relationship to the agency adjudicating the claim that the APA imposes requirements which are unique from those the courts have thus far stated are required by due process.

Hearing Officer Qualifications

The qualifications of hearing officers are established by the Civil Service Commission. Initially, in 1947, the CSC prescribed 6 years of experience in legal proceeding to qualify for appointment but bar membership was not required. This remained unchanged until 1964. However, to meet an earlier "appeals crisis" following establishment of the social security disability program the Congress enacted legislation in 1959 to allow the appointment of temporary hearing examiners "who have been admitted to practice before a Federal or State court of record who have had a minimum of 3 year's experience in the adjudication of claims for retirement, survivors, or disability benefits." (Public Law 85-766 extended through December 31, 1960, by Public Law 86-158). In the transmittal of the draft language for the temporary examiners the Commissioner of Social Security stated:

> * * * we would propose to comply with all provisions of the Administrative Procedure Act except those related to initial appointment. In other words, the classification and salary of the hearing examiner positions would be determined by the Civil Service Commission and all hearings would be conducted in strict compliance with the Administrative Procedure Act. Further, we would assure administratively that the persons appointed would exercise complete independence of judgment and would not be subject to any control or influence of the administrative agency—the Bureau of Old-Age and Survivors Insurance.

The American Bar Association's Administrative Law Section at that time opposed in principle the use of temporary examiners, although they acknowledged the problem of the work load crisis. This also was the stance of the Harrison subcommittee of Ways and Means which in its 1960 report was concerned with the fact that the "temporary examiners came almost exclusively from the administering agency:

> The subcommittee was concerned by the use of "temporary" hearing examiners recruited from the Bureau under a temporary suspension of the full requirements of the Administrative Procedure Act. In view of the tremendous backlog of cases awaiting hearings, this action may have been necessary. As a matter of principle, however, it does not seem desirable that hearing examiners be taken from the agency whose decisions they are reviewing and to which they will ultimately return. *The subcommittee is, therefore, gratified to learn that all these examiners will be separated from the staff by the end of the fiscal year and that such authority will not be requested from the Appropriations Committee in the future.* We have no reason to believe that the "temporary" examiners have treated claimants unfairly, but agree with the American Bar Association testimony that the principles of the Administrative Procedure Act should not continue to be disregarded through annual exceptions to its provisions.

In 1962, the Administrative Conference recommended the evaluation of candidates on the basis of training and experience and oral and written examination with lawyers participating in the evaluation of qualifications. After issuance of these recommendations, an Advisory Committee on Hearing Examiners established by the CSC reviewed all aspects of the personnel program. The qualification standards, including bar membership, and the examining procedures adopted by the CSC as a result of this study were issued in 1964. In 1970, the CSC adopted a recommendation of the Administrative Conference which gave added weight to trial experience in order to broaden the base of recruitment.

Currently, ALJ's must have 7 years of "qualifying experience," at least two of which must be within the 7-year period immediately preceding the date of his application; must consent to having confidential questionnaires (referred to by CSC as "vouchers") sent to employers, supervisors, law partners, judges, co-counsel and opposing counsel in cases in which he has participated; must demonstrate writing ability by preparing, under CSC supervision, a sample opinion which is examined for clarity, conciseness and legal soundness; and must participate in an oral interview by a board composed of a CSC official, a practicing attorney from the ABA and a Chief ALJ or an ALJ.

"Qualifying experience," as this term is used in the CSC Announcement for ALJ, means, inter alia, (1) judicial experience; (2) the preparation, trial, hearing or review of administrative law cases at the Federal, State, or local level; or (3) the preparation and trial of cases in courts of unlimited and original jurisdiction or appeals therefrom.

Mr. Edwin Yourman, a panelist for the September 26 hearing, has recently completed a report for the Social Security Administration on the hearings and appeals process which questions whether the limitation of "regulatory" or qualifying administrative law experience described in the Civil Service announcement for ALJ's is of "rational relevance", as required by regulation (5 C.F.R. 3000.103(b)), for the selection of ALJ's for beneficiary-type hearings. He believes that " a different and broader concept of qualifying experience for those recruited as ALJ's to conduct SSA beneficiary hearings would more clearly comply with CSC regulations. The requirement of seven years of experience in the trial or of adjudication of cases, without permitting the substitution or other experience for a portion of the period, seems excessive." He also notes that the CSC office of ALJ's will not always certify names for needed SSA ALJ positions and questions whether the Civil Service Commission has authority to exercise this control. He cites 5 U.S.C. 3105 [3] and *Ramspeck* v. *Federal Trial*

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[3] 5 U.S.C. § 3105 states:

"§ 3105. Appointment of hearing examiners.

"Each agency shall appoint as many hearings examiners as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Hearing examiners shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners."

Examiners Conference (1953) 345 U.S. 128, where the Supreme Court, in another connection, stated that the APA "does not reduce the responsibility of the (administrative) agency to see that it has a sufficient number of competent examiners to handle its business properly." Other commentators have argued that in the recent APA–SSI dispute, discussed in more detail later in this print, that once the Department of Health, Education, and Welfare had determined that the APA was applicable the Civil Service Commission should have provided the registers requested in that it has only ministerial responsibility in this area. Yourman would, however, retain Civil Service supervision of ALJ's to avoid actual or potential agency control but suggests the establishment of a separate register for ALJ's which will provide personnel for beneficiary hearings. He states:

> * * * There are sufficient differences between regulatory and beneficiary hearings to call for careful development of separate sets of qualification standards. Thus the personality, experience and skill necessary to preside over and evaluate the issues in a complex case involving trade or transportation economics, in which several parties and the government are represented by highly specialized counsel, bears little resemblance to the characteristics needed for a social security beneficiary hearing, where it is essential that the presiding officer's actions reassure the claimant that his case will be fully presented and considered. The economic case seems to call for an aloofness from involvement with either side, while a beneficiary hearing requires a warm and sympathetic approach and even a certain involvement to make sure that the claimant's case has been fully developed and presented.

Robert G. Dixon, Jr., another panelist at the September 26 hearing, has written in a similar vein "that the most creative thought is needed to work out models for future welfare adjudication, which has—and should—a distinctively different ethic from the hard-nosed economic regulatory adjudication ethic which produced the APA in the first place". Professor Dixon, of course, is speaking in a broader context than Mr. Yourman who is only speaking of separate registers.

As a caveat Mr. Yourman states that "we make our recommendation on the assumption that the ALJ's selected to conduct beneficiary hearings will not have a second-class status, and that standards and recruitment for this type of ALJ will be adequate to ensure a register of quality applicants".

Agency Control of Hearing Officers

The question of agency control over hearing officers is a fundamental issue of Administrative Procedure Act coverage. It is here that the major difference exists between the SSI hearing officer and the social security administrative law judge (ALJ). The APA was designed to insure the independence of a hearing examiner (now called ALJ's) from the agency in which he operates, by placing his pay, promotion, and tenure under the Civil Service Commission. The sections of the APA which carry out this purpose have been codified in sections 5362 and 7521 of title 5, United States Code.[4]

Under SSI, however, the regulations provide that no such appointment shall be made without the prior approval of the Secretary and that the agency will also review the work of the hearing examiners to determine whether it is of "an acceptable level of competence." In addition, the regulations provide that the Secretary "may promote a hearing examiner," and the Secretary is also permitted to withhold in-grade pay increases. Finally, examiner removal is placed in the agency's hands to be decided by a Secretary appointee.

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[4] 5 U.S.C. §5362 states:

"Hearing examiners appointed under section 3105 of this title are entitled to pay prescribed by the Civil Service Commission independently of agency recommendations or ratings and in accordance with subchapter III of this chapter of this title and chapter 51 of this title."

5 U.S.C. § 7521 states:

"A hearing examiner appointed under section 3105 of this title may be removed by the agency in which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing."

The problem of insulating the Bureau of Hearings and Appeals (BHA) from the Social Security Administration itself has sometimes been difficult and BHA attempts at supervising the procedural and substantive aspects of ALJ performance have on occasion been resisted by them and their organizations. For example, what are the proper limits on agency attempts to control the productivity of their hearing officers? Current statistics shows a rather dramatic variation in the number of cases that individual ALJ's decide on an annual basis. The question then arises, how does the BHA deal with this situation if at all under the APA, and how might it deal with the situations if such hearing were not under the APA?

The independence of hearing examiners and their immunity from ordinary agency personnel controls has been found as inhibiting to Federal administrators in the past. Then Assistant Attorney General Robert Dixon, now a professor of law at Washington University, has recently articulated these complaints. In writing on the broad policy issues of whether the APA should govern beneficiary type hearings, Dixon noted that "due process" does not require a complete divorce from agency control. He then stated that "it is now becoming clear in any event that the APA and especially its concept of life-tenure judges substantially immune from any effective Executive control is not well adapted to the newer situations of welfare adjudication. Insofar as standards are most difficult to formulate and consistently apply in 'need' and 'disability' areas and similar situations, a virtual life-tenure low-level cadre of highly independent claims determiners reviewable only by the regular judiciary may in the ultimate sense boomerang, and be undemocratic as well as unequal and inconsistent in operation." (Views of Office of Legal Counsel on kind of hearing officers required under SSI program, memorandum October 5, 1973).

Applicability of APA to SSI cases

An interpretation by the Civil Service Commission, opposed initially but finally very reluctantly accepted by the Department of Health, Education, and Welfare, of Public Law 92-603 which instituted the SSI program declared that SSI hearings are not under the Administrative Procedure Act. The "incredible series of developments" leading to the CSC opinion, the legislative background of the 1972 provisions, and the policy and administrative ramifications of the CSC action are outlined in detail in the Committee Staff Report (pages 55–78).

On November 16, 1972, HEW requested the Commission to establish registers of qualified administrative law judges to serve as SSI hearing officers. The Office of Administrative Law Judges of the Civil Service Commission declined to do so saying that the APA did not apply to SSI. The dispute raged on for almost a year and on October 12, 1973 Secretary of Health, Education, and Welfare Weinberger appealed to the Chairman of the CSC in the strongest terms citing "a crisis * * * in HEW's preparations to implement the new supplemental security income program * * *" On October 30, 1973, upon recommendation of the Commission's Deputy Executive Director, Chairman Hampton dispatched a letter to Secretary Weinberger saying the Commission was ready to establish ALJ's positions for SSI and to initiate a recruitment program. At this stage representatives of three ALJ organizations—the Conference of Administrative Law Judges, the Federal Administrative Law Judges Conference, and the ALJ Committee of the Federal Bar Association—protested the Chairman's decision and demanded a reconsideration by the full Commission and an opportunity to be heard. This hearing took place on December 3, 1973. Judge Ohlbaum of the NLRB presented representative views of those ALJ's who opposed having the APA apply to SSI. The minutes of the meeting show that:

> He said the Federal Government has two kinds of ALJs: those in the "model agencies" such as NLRB, FCC, FTC, etc., who are full APA instruments in that under APA they make decisions awarding large sums of money, radio and TM licenses, rights-of-way, etc. Then, he said, there is the "other kind"—namely the ALJs under the SSA program whose cases are vastly different from those handled in the model agencies. He said the SSA ALJs review files and rule on the record unless the claimant submits a request for a hearing. A key distinction, he said, is that under SSA, the Government is never represented. He said it was a mistake long ago when the decision was made that hearings would be presided over by ALJs and that SSI ALJ authorization would further compound the "classification error."

Deputy Social Security Commissioner Arthur Hess was the principal spokesman for HEW and for the coverage of SSI under the APA. The minutes of the meeting summarize his views as follows:

> He agreed that the law is ambivalent and that the manner of handling SSI claimant hearings is "profoundly a matter of policy." He urged the full Commission to adhere to the earlier agreement to go the APA route with ALJs presiding. To do otherwise, he said, would be to deny essential rights to claimants.
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> * * * * * * *
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> Commissioner Hess urged that full APA procedures be applied under SSI as under SSA—that the Department and the Commission should not create artificial distinctions between types of due process accorded claimants under the two programs. Sometimes a claimant will have a claim filed under both programs and separate adjudicatory processes would be administratively unsound and confusing to the claimant. Also, HEW wants SSI under APA in order to assign the entire corps of ALJs freely wherever the workload peaks. If a separate system is installed under SSI, then the SSA ALJs may not be interchangeable with the SSI hearing officers—and vice versa.
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> * * * * * * *
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> In summary, he urged the Commissioners to endorse HEW's determination to accord a lowly private citizen—a welfare recipient—the same rights as the Government accords a powerful corporation in contested matters: namely, the right to appear before an administrative law judge under the full rights and protection of the Administrative Procedure Act.

Then on December 14, 1973, the decision of the full Commission which reversed the Chairman's action of October 30 was sent to HEW declaring that the APA was not applicable to SSI and that the Secretary should go ahead under his own appointing authority to appoint SSI hearing examiners at GS–13 and an appropriate number of supervisory examiners at GS–14.

It is the opinion of the staff that APA coverage was originally intended by the Congress and that the CSC opinion was not only erroneous as a matter of legal interpretation but it also has exacerbated the appeals crisis. The Public Assistance Subcommittee has reported out H.R. 8911, 94th Congress, a bill which would amend the hearings and review provisions of SSI so that they are on all fours[5] with those for social security, including the adoption of the substantial evidence rule for judicial review. Moreover, the legislation would give the Secretary of Health, Education, and Welfare authority to make temporary appointments (which cannot extend later than December 31, 1978), of hearing examiners who do not meet the requirement of the appointment section of the APA (5 U.S.C. 3105). These hearing officers would have to be admitted to the bar and have at least 5 years experience in the adjudication or consideration of Social Security Act claims or have engaged in the general practice of law for at least 5 years.

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[5] The 30 day period for an individual to appeal is retained for SSI: social security's period is 6 months.

Unlike the current SSI examiners, they would also be authorized to conduct hearings under social security (title II) and medicare (title XVIII). This will create a common corps of examiners and enable the Bureau of Hearings and Appeals to effectively utilize all its resources. Currently, the approximately 100 SSI examiners cannot hear social security cases and inasmuch as almost half of the disability cases are concurrent cases (applications under both social security and SSI) this has made it much more difficult for the Bureau of Hearings and Appeals to manage the backlog of cases. The legislation will also do away with the anomolous situation whereby disability adjudications of equal difficulty under the same definition and procedures are made by hearing officers two grades below those who are authorized to do social security cases.

Measures to Reduce the Backlog

1. Remand to State Agency

An obvious solution to the appeals backlog is the remand of cases back to the State agency for, in theory at least, their speedy disposition. This has been going on with a two-stage effort. First, social security regional office personnel have examined backlogged hearing cases in "development centers" or in ALJ offices to identify cases which might be reversed by the State agency. Roughly, 12,000 cases were remanded this year and about half of them were reversed using this procedure. Second, under a new procedure just getting underway, district office personnel will examine files of individuals who request a hearing and route those that possibly can be reversed back to the State agency rather than to BHA development centers or ALJ offices. This latter process may involve in the neighborhood of 60,000 cases. Through August 27, 1975, about 2,000 such cases have been again reviewed by the agencies with 5.9 percent being reversed on the record transmitted from the district office and another 11.6 percent reversed after further record development. Thus, about 82 percent of these remanded cases where a decision has been made have been sent back to the BHA hearing process as still denied but half of these have had more documentation added to the file.

The advantages to the claimant who is awarded a benefit without waiting through the hearing backlog is clear. The effects on claimants who still are denied benefits are not so clear. Will the re-reconsideration mean a longer waiting period before a hearing is ultimately held? The so-called mandatory reconsideration itself is not a procedure set forth in the statute but in the regulations and there are those who have criticized it as exhausting the individual in "exhausting his administrative remedies."

There are also some administrative ramifications of these remand procedures. State agencies have had to take on workloads they were not budgeted for and presumably this affected their processing of initial determinations. Presumably these steps were taken because State agency workloads were such that they were in a better position to process the cases than the ALJs. This is a matter of dispute and representatives of the State agencies protested the lack of notice on the remand operation. Also, there is a question of how effective it is to have a State agency look at the same case three times within what could be a relatively short period of time—is this paper-shuffling rather than disability adjudication? Change of condition is often the determinant of a case reversal but if the adjudication is on the same record is the process being advanced very much? These questions will be taken up with administration witnesses and the panel of State agency administrators who will be before the committee on October 3.

2. *Face-to-Face Contact with Claimant on Reconsideration*

Many of the commentators who have studied the system in recent years and have noted that the rising reversal rates of social security hearing officers have laid heavy emphasis on the fact that the hearing is the first time that an adjudicator has face-to-face contact with the claimant. An interesting study entitled "State Agency Reconsideration Interview Study" (SARIS) was carried out by the Social Security Administration in 1971 to determine if a personal interview between the claimant and disability examiner at the State agency reconsideration level would result in more complete development of cases, better claimant acceptance of the decision, and a subsequent reduction in the number of appeals. Although the experiment was marred by different procedures used by the five State agencies participating and certain biases in the selection of the cases, the results did show a rather significant increase in the allowances rate for the cases with a personal interview and lower reversal rate on appeal for this type of case. On the other hand, almost as high a percentage of the interviewed cases requested a hearing as those who were not interviewed. The following table gives a breakdown of the 1,255 randomly sampled cases which had been through the regular reconsideration procedures and whose initial denial was ready to be affirmed by the State agency:

	Interview cases		Noninterview cases	
	Number	Percent	Number	Percent
Total number of denials	671		584	
Denials changed to allowances	132	19.6	8	1.3
Denials upheld	539		576	
Requested hearing	214	39.7	241	41.8
Decision changed at hearing	46	22.2	73	37.2
Decision change—total cases, reconsideration and hearing	178	26.0	81	14.0

The Social Security Administration rejected this procedure on a "nationwide, mandatory basis" although it stated that "most States are now using the telephone to contact reconsideration claimants where there is a question unanswered or it appears that additional sources may exist." The administrative implications of such a system were described by SAA as follows:

> Most optimistically, a State agency examiner might review the file and interview four claimants each day, provided these claimants could be scheduled for their interview at a central location. If travel to several locations were necessary, this figure would be correspondingly lower. Projections as a result of SARIS show that a minimum of 254 additional examiner-years would be necessary for each 100,000 reconsideration interviews to conduct interviews only in the metropolitan areas. Should States conduct the interviews Statewide, this projection might be increased by as much as 50 percent because of travel time and other time-consuming factors.

Since the publication in 1974 of the Committee Staff Report where considerable attention was directed to SARIS and the issue of face-to-face contact, generally, the Social Security Administration has done some rethinking in this area and initiated a new study. This 16-State study which encompasses about 30 percent of their reconsideration workload has been endorsed by the Report of the Disability Claims Process Task Force (Boyd report). This internal study stated "We had previously recommended a test of this procedure, and suggest only that success be measured by whether the system results in significant improvement in correct decisions, rather than whether it reduces the incidence of hearings." As opposed to SARIS the new process will be conducted statewide rather than primarily in metropolitan areas. There will be no exclusions because of the type of disability involved as under SARIS. In addition, the State agency examiner will attempt to contact the claimant over the phone immediately upon receipt and review of the folder, if there is insufficient evidence for a reversal, rather than waiting till the end-of-line interview for the first contact. Greater latitude will be given the examiner as to when the face-to-face interview should take place. While most will take place after the telephone developmental interview and following all necessary development on the case, the personal interview could be held immediately after the telephone call where, in the judgment of the state agency examiner or the claimant, an immediate interview is desirable. In either case, the claimant would receive at least one telephone call and, at least in denial cases, one face-to-face interview with a trained disability examiner during the reconsideration process. Moreover, the face-to-face interview, regardless of when held, will be developmental in nature—an evidentiary hearing, rather than a denial interview as SARIS was supposed to be.

In the questionnaire sent to the State agencies by the staff it is indicated that an overwhelming number of them are in favor of a face-to-face conference at the reconsideration level. Only two States did not like the idea of such a procedure. One State agency believed that face-to-face contact would undermine the objectivity of decisionmaking while the other did not want to see such procedures unless the disability determination units are federalized. A majority of the State agencies believed that appeals would be reduced by such a procedure but a few States thought they might be increased. The latter reasoned that many claimants do not appeal through ignorance and that when the process is explained face-to-face more of them will appeal. ("Staff Survey of State Disability Agencies Under Social Security and SSI Programs," pp. 15–16, 174–186.)

Quality of Adjudication

Although the current hearings were called primarily because of complaints of delays in the appeals process, the issue of the quality of adjudication must be considered. Over recent years the number of cases reversed on appeals has been increasing and the Social Security Administration has stated that it is playing a growing role in the actuarial deficiency in the disability insurance program. SSA states "While this higher rate of increase in the appeals process does not, of course, completely explain the increases (in allowances) in recent years, we feel that these increases do contribute substantially to the total increase." As is shown in table 9 the ALJ reversal rate was just under 20 percent n 1960 but now stands at around 50 percent.

In this situation the incentive to seek a hearing seems substantial and one has to wonder whether some of the less aggressive individuals who do not appeal are any less disabled than some who prevail at the hearing level.

There is also a rather significant variation in the reversal rate by ALJ's which a number of commentators believe indicates a weakness in the system. Edwin Yourman writes:

> Variations in ALJ decisions for which no explanation has been found other than differences in individual ALJ judgment and evaluation indicate the necessity of innovative action to improve adjudication quality. The decisions (not including Black Lung) of 418 ALJ's for most of the first half of calendar year 1974 show that about 27 percent of the ALJ's had an allowance rate between the 51st and 60th percentiles; almost half had an allowance rate between the 46th and 65th percentiles. Thus, slightly more than half of the ALJ's had allowance rates outside this 20 percentile spread: 32 percent allowed fewer than 46 percent of their cases and 21 percent allowed more than 65 percent of their cases.
>
> Heavier work loads and efforts to increase individual ALJ production place more strain on the quality of adjudication. Thus

> it is important to have a method of knowing how well the ALJ's perform—not just how much they produce.

And Professor Dixon writes:

> Production statistics reveal that there are extreme disparities among an appreciable number of hearing examiners, not only nationally but within the same region, regarding their rate of reversal of SSA decisions. Such data provides a further basis for questioning the uncertainty of the standards and the resultant large amount of examiner discretion and also for questioning the adequacy of present Appeals Council review as a centralizing, standardizing force. (p. 76, "Social Security Disability and Mass Justice" (1973).)

Moreover, since Professor Dixon wrote his book the amount of Appeals Council review has significantly decreased. Yourman points out that "at one time, an (Appeals Council) analyst reviewed each hearing allowance to determine whether to recommend own-motion review. This has now been reduced to the extent that only about 5 percent of ALJ allowances, on the average, are reviewed." In the past there was program agency review (Bureau of Disabilitity Insurance primarily) but Yourman states that is is now "infrequent because a combination of volume of work and the 90-day limit within which the Appeals Council can take own-motion review frequently makes it impractical for the program bureaus to identify decisions for which they believe a review is important". Both the Committee Staff Report and Yourman suggest possible reinstitution of program agency review but with such a request for review clearly on the record so that APA safeguards of an independent adjudication are preserved.

Some of the same questions which exist at the hearing level exist on reconsideration though there are significant differences. The percent of reversals by the State agencies on reconsideration over the years have been relatively stable—between 30 and 40 percent. The variation in rates between State agencies—like that on initial determinations—was quite substantial in calendar 1974, varying from a low of 19.5 percent in Kentucky to 45.9 percent in New Jersey with a national average of 30.5. Opinions differ as to the significance of these statistics. Like Appeals Council review, Federal agency review of State decisions has changed in recent years from a 100-percent check before the decision was effectuated to a small sample after the decision has been communicated to the claimant.

Finally, mention should be made of the dearth of precedent material which is available to ALJ's. They must adjudicate their cases on the law, regulations, and whatever pertinent social security rulings are published. As is noted in chapter E of the Committee Staff Report (pp. 45–50) the development of regulations has been slow and they still lack specificity. The social security rulings have not been too useful in the disability area and the Appeals Council does not publish precedent opinions of ALJ's. Some commentators have suggested that in this situation one can only expect highly individualized and nonuniform decisions. The inherent difficulty of providing precedent material with respect to such a highly subjective concept as the social security definition of disability must, however, be recognized.

Impact of Social Security Litigation

The number of social security cases which are appealed to the courts have been steadily increasing. The first sizable flow of the supplemental security income (SSI) cases will soon reach the judicial review stage and a large number of black lung cases are being appealed to the courts. In this section, attention will be placed both on the workload aspects and the impact on the Federal judiciary. Also the implications on the hearings process of the *Eldridge* case, which is pending before the Supreme Court, are briefly discussed.

CASELOAD

In the fiscal 1960, 618 social security cases were filed in district courts; in fiscal 1973, 2,267 were filed. Disability filings for the last quarter of 1972 were 444. They had increased to 631 for the third quarter of 1973. The great majority of social security cases (75 to 80 percent) are disability claims. The following table shows the growth in terms of pending cases at the end of the fiscal year.

End-of-year growth in pending cases [1]

Calendar year	Total social security cases	Disability cases
1960	337	----------
1968	1, 751	1, 307
1969	2, 370	1, 748
1970	2, 769	2, 001
1971	3, 148	2, 251
1972	3, 775	2, 676
1973	4, 033	3, 018
1974 (June 17)	[2] 5, 092	4, 187
1974	[2] 6, 191	4, 301
1975 (end of August)	[2] 9, 226	4, 723

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[1] These statistics have been supplied by the Office of General Counsel.

[2] Including black lung cases. 384 black lung cases were pending on June 17, 1974; 1,200 were pending on Jan. 1, 1975; and 3,338 were pending on Aug. 31, 1975.

The statistics of the Administrative Office of the U.S. Courts for fiscal 1973 shows a median time of 3 months for disposal of social security cases, but that at the other extreme, 10 percent requiring 29 months (Annual Report, p. A–28). Perhaps related to these statistics are those of the backlog of cases facing social security and regional attorneys. An indication of the impact of social security cases on the Department of Health, Education, and Welfare is the fact that this August they prepared 502 social security and black lung court briefs.

Social security court workload is very uneven throughout the country. More claimants seem to apply for benefits and to appeal denials with more frequency in certain parts of the country than in others. For instance of the 2,595 pending social security cases at the end of fiscal 1973, 887 (34 percent) were before the following five district courts:

Puerto Rico	252
South Carolina	182
West Virginia-southern	111
Kentucky-eastern	297
Kentucky-western	42

The jurisdictions noted account for considerably less than 10 percent of the disabled workers receiving benefits, even though all these jurisdictions have an extremely high incidence of disability compared to the national average.

In terms of court workload by circuit the same disparity existed. The fourth and fifth circuits have had 47 percent of all the disability court cases. The fourth, fifth, and sixth circuits taken together have had 69 percent of the cases and they will be even harder hit when the black lung cases mature. On the other hand, New York and California which have had roughly 20 percent of the disability caseload have had only 6 percent of the court cases.

IMPACT ON JUDICIARY

Finally, there is the question of the effect on the Federal court system of a growing disability caseload which will be greatly accelerated in the next few years by black lung appeals and, more importantly over the long run, by cases coming up under the supplemental security income program.

It can be argued that in the recent past the impact of social security was not particularly significant in that it constituted, as late as fiscal 1973, only 2.5 percent of Federal district court civil filings. Pursuing this line of argument, it could also be noted that although the number of cases may be large, they are nearly all decided on motions for summary judgment and presumably take relatively little of the court's time.[3] It might also be pointed out that the volume of social security disability litigation in fiscal 1973 was only twice that arising under the Federal Employers' Liability Act (applicable to about three-quarters of a million railroad employees) and only slightly more than half of the number of cases filed under the Jones Act (applicable to a million seamen). On the other hand, these latter statutes are not analogous to the social security, SSI, and black lung programs with their many layers of administrative review nor do they have the potentialities for growth of the latter. Social Security, SSI, and black lung cases are now approaching 10 percent of all civil filings.

Obviously, the impact of the social security disability caseload on various courts in the country is uneven and, undoubtedly, will be of crisis proportions in certain judicial districts in the next few years. For instance, in the second and tenth circuit social security cases constituted only 1 percent of civil caseloads; but in the fourth circuit they made up 5 percent. In the District Court for Eastern Kentucky they were 22 percent of the civil caseload.

F[illegible] CASE LAW ON HEARINGS BEFORE TERMINATION OF BENEFITS—*ELDRIDGE* v. *WEINBERGER*

Persons who are denied social security or SSI benefits upon initial consideration are not paid benefits pending appeal. There is no particular controversy about these provisions of the law. However, the law and regulations regarding termination of benefits under both social security and SSI have become increasingly controversial because of the decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). In this decision the Supreme Court held that under due process requirements federally aided public assistance payments could not be suspended or terminated without first giving the recipient adequate notice and an effective opportunity to confront adverse witnesses and to present his own evidence and arguments orally. The Department of Health, Education, and Welfare has substantially adopted the *Goldberg* decision standards for the SSI program. In contrast to SSI, the Department of Health, Education, and Welfare has not fully adopted *Goldberg* for social security cases and is terminating benefits without an evidentiary hearing. Whether this can be done constitutionally will be squarely presented to the Supreme Court in the October term in the case of *Eldridge* v. *Weinberger*, 361 F. Supp. 520 (1973).

Some of the major arguments of the Administration in opposition to the application of *Goldberg* to social security terminations are the fiscal ramifications of continuing benefit payments during the appeal period and the impact of further rights to appeal on an extremely hard-pressed appeals process. The Administration estimates that an adverse decision would require about 11,000 additional hearings a year. Currently there are over 110,000 hearing cases pending before the Bureau of Hearings and Appeals—about a year's backlog. Of course, it is not altogether clear how the Social Security Administration might conduct *Goldberg* v. *Kelly* hearings since presumably the requirements of the Administrative Procedure Act, which are followed in title II (social security) cases and are imitated in title XVI (SSI) cases, would not necessarily have to be followed under the due process requirements of the *Eldridge* opinion. Thus, as a contingency measure in the event the Government loses the *Eldridge* case before the Supreme Court, the Social Security Administration has launched a "due process" project to test the feasibility of the state agencies conducting "hearings" or "conferences" to meet *Kelly* v. *Goldberg* requirements. If after such a hearing the initial determination of cessation of disability is affirmed, benefits then are stopped, but the individual is still entitled to request a hearing before an ALJ. The test is being conducted in Indiana, Iowa, Kentucky, Michigan, Montana, Pennsylvania, and Washington. The ramifications of such a procedure on the State agency operation is a subject which will be discussed by the panelists on October 3, 1975.

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[3] This means that there are no jury trials which may be time consuming. On the other hand, the examination of the often voluminous record in disability cases can be time consuming and most cases require written opinions of substantial length.

Pending Legislation—Appeals Procedure

H.R. 8018 (Mr. Sisk) and similar bills introduced by him and other Members involves a basic rewriting of the social security appeals process to make a number of significant changes. Section 205(b) of the Social Security Act which contains hearing procedure requirements would be expanded by H.R. 8018 into nine separate paragraphs. Section 205, as amended by the bill, will be discussed paragraph by paragraph to show the changes in existing law and possible ramifications.

SEC. 205(b)(1)—HEARING ON TERMINATION OF BENEFIT

The Secretary of HEW is directed to make findings of fact, and decisions as to rights of any individual applying for a payment under this title II (social security). This is identical to existing law. The subcommittee may also wish to consider whether the statute should spell out the hearing rights for beneficiaries whose benefits are terminated, suspended, or reduced and the status of benefits during the hearing. Cases, however, are not pending before the U.S. Supreme Court and U.S. courts of appeals which will probably further delineate constitutional requirements in this area.

SEC. 205(b)(2)—MANDATORY RECONSIDERATION—TIME OF APPEAL

Gives statutory support to certain administrative procedures that have been utilized for many years, i.e., a mandatory reconsideration before a hearing is authorized. Most commentators believe that this reconsideration which is undertaken by the State agency that conducted the initial determination is a useful procedure. Roughly a third of the reconsidered cases result in an allowance of benefits. The issue is more fully discussed in the Committee Staff Report, pp. 35–38, and Mr. Yourman has endorsed mandatory reconsideration in his recent report. The staff survey indicates that a large majority of the State agencies do not want mandatory reconsideration eliminated (see pp. 47–48, 415–422).

This paragraph also requires the claimant to file for a reconsideration within 30 days from the date of the mailing of notice of the initial determination. Some administrators of the program have suggested that reducing the time period of appeal would have a beneficial effect on the social security disability program in speeding up the appeals process. In the SSI program the time for a claimant to appeal is 30 days. They point out that in social security an individual has a full 6 months to decide whether to request reconsideration and then another 6 months to decide whether to appeal to an administrative law judge. The law states merely that "any such request with respect to such a decision must be filed within such period after such decision as may be prescribed by regulations of the Secretary, except that the period so prescribed may not be less than 6 months after notice of such decision is mailed to the individual making such request." The possible double 6-month period is the inevitable result of the imposition of the mandatory reconsideration requirement for, as the Social Security Administration puts it, "if the claimant had less than 6 months in which to exercise his right to reconsideration and, failing to exercise this right, was thereby precluded from exercising his right to hearing, he would in effect be deprived of right to a full 6-month period after notice of SSA's decision in which to request a hearing." Thus, the problem of the length of time and mandatory reconsideration are closely linked. Statistics show that about 80 percent of persons appealing both for a reconsideration and a hearing do so by 120 days and about 44 percent have done so within 30 days. A listing of the elapsed days before filing of appeals, based on an analysis done in 1972, follows:

Internal	Reconsideration		Hearing	
	Percent	Cumulative	Percent	Cumulative
Elapsed days from date of denial notice to date of filing of appeal:				
0 to 5	5.9	5.9	4.0	4.0
6 to 10	13.2	19.1	15.4	19.4
11 to 15	9.1	28.2	5.3	24.7
16 to 20	6.5	34.7	9.1	33.8
21 to 25	4.7	39.4	7.0	40.8
26 to 30	5.4	44.8	3.7	44.5
31 to 60	17.0	61.8	16.0	60.5
61 to 90	11.3	73.1	12.4	72.9
91 to 120	8.1	81.2	6.4	79.3
121 and over	18.8	100.0	20.7	100.0
Mean (days)		60.9		65.6
Median (days)		36.0		39.0

SEC. 205(b)(3)—FACE TO FACE CONTACT ON RECONSIDERATION

This language makes the current face-to-face experiment on reconsideration a statutory requirement (see pages 10 and 11) which the claimant may take advantage of or waive as he desires. Probably the biggest issue in this area is how would it be effectuated administratively since in most of the reconsidered cases the issue will be disability and thus, State agency personnel skilled in evaluating disability would be involved. Most State agencies are not decentralized and such a development may make rather major changes in their current operation. This subject will be addressed by the panel of State agency administrators scheduled to testify on October 3.

SEC. 205(b)(4)—RECONSIDERATION REQUIRED IN 90 DAYS

This language appears to be a spelling out of administrative practice with the exception of the requirement that the reconsideration be accomplished within 90 days. The latest statistics available (May 1975) indicate that the median time for reconsideration is 43 days on affirmances and 86 days for reversals.

This is also a provision whose ramifications should be discussed with the State agency administrators.

SEC. 205(b)(5)—DEFINING THE ISSUE FOR HEARING

This language is a spelling out of current administrative practice to notify the claimant in writing of the denial of benefits on the reconsideration. It goes beyond present practice in requiring that he be provided with:

(i) a summary of the evidence pertinent to the issues,

(ii) a citation and discussion of the pertinent law and regulations, and

(iii) the determination made on the issues and a summary of the reasons therefor.

Under existing practice only very generalized statements are sent to the claimant. Moreover, the trend in recent years have been for briefer and more generalized denial notices.

SEC. 205(b)(6)—HEARINGS

Gives the claimant 30 days to file for a hearing. Unlike the current practice where a hearing can be obtained on simple request in writing, the bill would require that the request shall set forth specific allegations of error of fact or law related to specific items in the statement of the case; and failure to do so shall be grounds for dismissal of the claim. The claimant shall be presumed to be in agreement with any statement of fact contained in the statement of the case with respect to no allegation of error is made.

Paragraphs (b) (5) and (6) are obviously an attempt to provide by statute a pointing up of the issues for the hearing process so that they can be carried out expeditiously. Many ALJ's have complained about the quality of the records that are sent to them and the inordinate amount of their time that is spent on case development. On the other hand the State agency may argue that they have been pressed to make speedy adjudications and the statement of the case required by (b) (5) may be quite burdensome. From the claimant viewpoints some may consider the requirement of specific allegations of error of fact or law or dismissal of the claim as burdensome and to necessitate legal representation. Probably one of the advantages and disadvantages of the current social security appeal process is the open record concept where new evidence is continually solicited and entered in the record and the facts and issues are continually changing. The administration witnesses, the administrative law experts, and the State agency administrators should all have opinions on this subject.

H.R. 5276 (and similar bills) introduced by Congressman Seiberling would provide time limitations for decisions concerning social security benefit claims at each of the determination levels, i.e., the initial determination (90 days), reconsideration (90 days), ALJ hearing (120 days), and Appeals Council (120 days). This bill also provides that if any decision is not made within the time periods specified, a claimant shall be paid monthly benefits determined solely on the basis of his application and wage records, and that such payments will not be considered overpayments for purpose of recovery.

SEC. 205(b)(7)—HEARINGS UNDER APA AND GS-16 CLASSIFICATION FOR ALJ'S

This provision is similar to the Duncan bill (H.R. 2995) and similar bills which say that hearings on social security claims shall be "conducted on the record" and shall be subject to all the operative sections of the Administrative Procedure Act for "adjudications." Under existing law, coverage under the Administrative Procedure Act has been assumed under language which provides for an on the record adjudication but does not use the actual words "on the record." However, the Attorney General's Manual on the APA which was issued in 1947 states that hearings under social security were the type of "adjudications" which were envisioned by the Administrative Procedure Act. Be that as it may this provision would resolve any controversy about the matter and furnish a very explicit and unequivocal congressional declaration that full APA treatment is to be afforded to social security hearings. This paragraph under the other sections of the bill apply only to title II (social security) and title XVII (medicare). The status of SSI procedure and its coverage under the APA are not affected.

The paragraph also provides that the administrative law judge conducting hearings under these provisions shall be not less than a GS-16. At present, the Civil Service Commission has classified social security ALJ's at GS-15 while most of the ALJ's of the other departments and the regulatory agencies are classified at GS-16. The reason for the grade differential is not particularly well-articulated by the Civil Service Commission. Those who defend it speak of more "complex and difficult" cases in the regulatory agencies and the fact that they are adversary proceedings. Other commentators point to a Civil Service bias toward the "pure" ALJ's who conduct regulatory hearings and point out that there is no objective evidence of the greater difficulty in regulatory agency cases. Moreover, it can be argued that the fact that the social security hearing is nonadversary puts a greater burden on the ALJ in that he must develop the case as well as make the ultimate decision. Perhaps a more basic reason for Civil Service opposition to GS-16 for social security ALJ's is the numbers involved.

There are now over 300 GS–16 ALJ's primarily in regulatory agencies. There are, however, over 400 social security ALJ's and if difficulty of the case is a criterion for the grade of hearing officers it will be extremely difficult to rationalize the GS–13 for SSI hearing examiners.

It should be recognized that the grade level of ALJ's throughout the Federal Government is rather chaotic. In recent years there has been a tendency on the part of Congress when it passes a new program to stipulate grade GS–16 for its hearing examiners. An example of this is the legislation on the occupational health and safety program. On the one hand it can be argued that inasmuch as there is very little evidence that adjudications under these programs are more difficult than social security, medicare, or SSI, the GS–16 should be established for Social Security Act ALJ's by statute. On the other hand, some would argue that perhaps Congress should not be in the job classification business on an individual program basis. But this then brings us back to the question of whether the alternative to this—classification by the Civil Service Commission—is being done in a fair and equitable manner. These questions can be explored with representatives of the Commission when they appear before the subcommittee on September 19.

SEC. 205(b)(8)—HEARINGS ON SECRETARY'S MOTION

This paragraph restates existing law which authorizes the Secretary, on his own motion, to hold hearings and conduct investigations. The following provision of Section 205(b) in existing law is not included in H.R. 8018:

> * * * In the course of any hearings, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

SEC. 205(b)(9)—REGULATIONS

Authority is given to issue regulations with respect to hearings and appeals.

APPENDIX

[Excerpt from status report by Social Security Commissioner Cardwell on Ways and Means Committee Staff Report on Disability Insurance Program]

3. SOCIAL SECURITY APPEALS PROCEDURE

Summary

The staff expresses considerable concern about the appeals process, not only in terms of volume and delay, but also in terms of the question of whether the same disability standards are applied at each level of adjudication and review. Referring to the "appeals crisis," the staff recommends that the Committee may wish to reexamine the complex structure of the appeals procedure to determine what changes would be appropriate. Reference is also made to the staff's belief that the conclusion of the Civil Service Commission with respect to the applicability of the Administrative Procedure Act (APA) to supplemental security income (SSI) hearings is clearly contrary to the intent of the Committee and the Congress. It is suggested that action be taken to clarify Congressional intent in this respect.

Action:

In-house work groups have reviewed the appeals process and have made numerous suggestions for improvement which have either been implemented or are being considered. For example, SSA has put into effect an experimental procedure authorizing informal remand of disability claims awaiting hearing upon the presentation of new evidence. This should act to reduce the hearing backlog in cases where adverse decisions can be reversed on the basis of the new evidence and to speed up determinations in general.

Among the initiatives that have been or soon will be instituted to help reduce the hearing backlog are:

1. Allocation of additional support staff to backlogged hearing field offices.
2. Appointment of permanent assistant chief administrative law judges in all regions.
3. Creation of a strong hearings management capability.
4. Creation of a hearings staff attorney support program to assist individual presiding officers.
5. Assignment of trained analysts from central office to hearing offices on a temporary basis.
6. Acquisition of more sophisticated equipment by the Bureau of Hearings and Appeals for recordkeeping/processing purposes.
7. Counseling program in improved judicial techniques modeled after the Federal court system for low producers.

We are continuing to expand our cadre of administrative law judges which in turn has increased our capacity to hear and dispose of cases.

Backlogs of disability hearings requests, which constitute the great majority of hearings, are being reviewed and screened in the regions to determine if additional documentation is needed or whether favorable action can be recommended.

In addition, we have contracted with an outside consultant, Mr. Edwin Yourman, to conduct an independent study of the SSA hearings, appeals and judicial review process. The findings and recommendations from this study have just been released and are undergoing review and analysis.

Professor William D. Popkin of the Indiana University School of Law has been authorized by the Committee on Grant and Benefit Programs of the

Administrative Conference to prepare an analysis of the role of representatives in administrative decisionmaking based on a study of five disability programs, one of which was the social security disability program, This report should be released sometime this summer and should provide an independent appraisal of certain aspects of the appeals process.

We have initiated a Reconsideration Interview Study which is aimed at obtaining face-to-face or at least telephone contact between the claimant and State agency adjudicator at the reconsideration level. Also, the HEW Audit Agency has reviewed the disability reconsideration operations. This report has not yet been issued.

We favor the HEW efforts to make the APA applicable to title XVI hearings.

TABLE 1.—*Median processing time in calendar days for social security disability cases, by type of determination: selected months*[1]

Month and year	Initial determinations[2]	Reconsideration requests		Hearing requests
		Affirmed	Reversed	
June 1967	90	87	(3)	98
December 1967	95	(3)	(3)	87
June 1968	91	(3)	(3)	92
December 1968	80	(3)	(3)	91
June 1969	63	(3)	(3)	90
December 1969	66	(3)	(3)	97
June 1970	62	62	72	106
December 1970	77	59	73	112
June 1971	88	93	70	112
December 1971	69	72	68	124
June 1972	61	71	64	142
December 1972	75	85	69	165
June 1973	68	86	71	177
November 1973	75	64	95	163
April 1974	71	74	105	163
December 1974:				
Allowance	104			
Denials	(3)	55	92	[4] 203
May 1975:				
Allowance	72			
Denials	47	43	86	[4] 209

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[1] Processing time is measured from receipt of an initial application (or request for reconsideration or hearing) to disposition.

[2] Rates for initial determinations relate to State jurisdiction claims only. Beginning in June 1968, rates were determined from a 2 percent sample.

[3] Not available.

[4] Affirmances and reversals combined.

TABLE 2.—*Comparative processing times based on a sample of 427 cases*

Period measured	Reversals		Affirmances	
	Average days	Range	Average days	Range
Initial application to receipt of decision by BDI	530. 6		606. 79	168–1314
Initial application to award notice	578. 9	176–1, 364		
Initial application to hearing request	298. 0	50–924	290. 58	63–798
Initial application to recon notice	231. 7	47–830	221. 04	51–756
Recon notice to request for hearing	66. 4	0–377	68. 17	0–343
Request for hearing to receipt of decision by BDI	232. 6	66–690	315. 33	150–824
Request for hearing to receipt of C/F by BHA	26. 1	3–145	25. 38	6–199
Request for hearing to request for C/F	6. 43	0–105	5. 7	0–185
Request for C/F to release from BDI	13. 25	1–132	12. 59	0–98
C/F received by BHA to case assigned to ALJ	48. 0	0–282	35. 58	0–440
Case assigned to ALJ to hearing	79. 0	0–435	68. 16	8–394
Hearing to ALJ decision	55. 0	0–304	60. 03	0–274
ALJ decision to receipt by BDI	27. 2		136. 65	
ALJ decision to receipt by BHA	3. 4	0–33	4. 09	1–90
Receipt by BHA to release by BHA	[1] 18. 1	0–413	129. 00	2–498
Release by BHA to receipt by BDI	4. 3	1–24	3. 56	0–105
Request for hearing to hearing	152. 78	35–572	128. 15	21–410
Request for hearing to ALJ decision	205. 35	52–587	177. 66	21–493
Receipt by BDI to award notice	46. 0	16–412		
Receipt by BDI to receipt in Recon	7. 1	0–31		
Receipt in Recon to date 831 signed	7. 4	0–41		
Receipt in Recon to date 101 signed	13. 6	0–202		
Date 101 signed to date 107 signed	11. 2	0–79		
Date 107 signed to award notice	13. 3	3–374		
ALJ decision to award notice	70. 3	25–451		
Request for hearing to award notice	275. 6			

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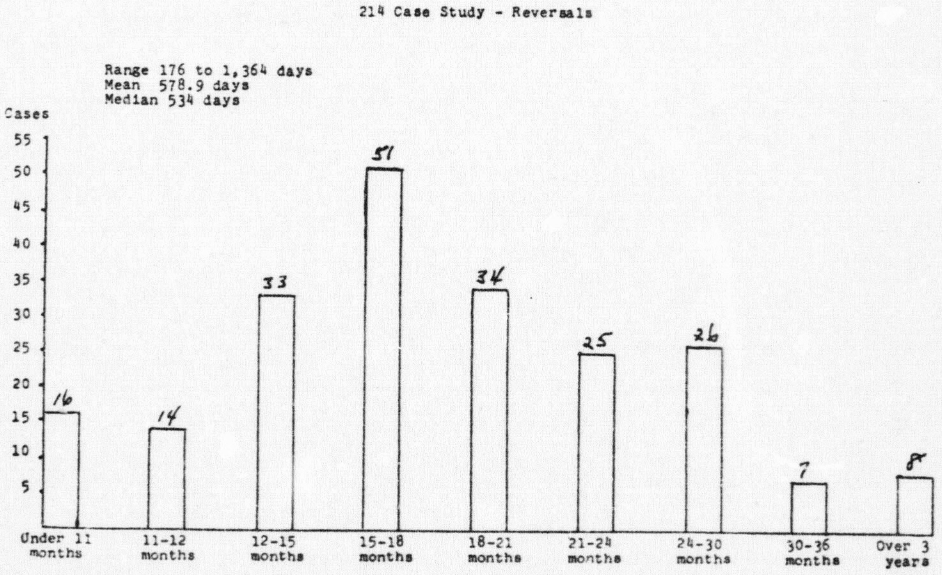
[1] If 7 Appeals Council cases were excluded, average would be 7.3 days.

TABLE 3.—*Time from date initial application filed to date of award notice*



214 Case Study - Reversals

Range 176 to 1,364 days
Mean 578.9 days
Median 534 days

TABLE 4.—*Time from date initial application filed to receipt by BDI after BHA review*

213 Case Study - Affirmances

Range 168 to 1,314 days
Mean 606.79 days
Median 579 days

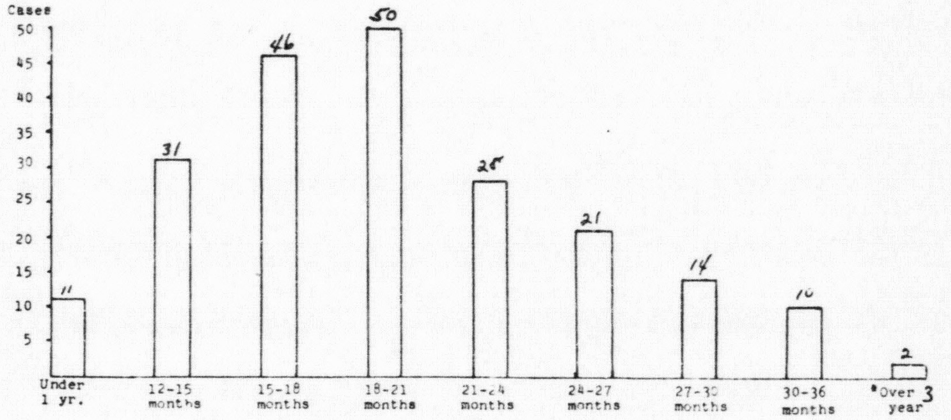


TABLE 5.—*Processing time*[1]*—Bureau of Hearings and Appeals*

Month/year	Request for hearing[2]	Request for review[2]
June 1971	118	42
December 1971	133	41
June 1972	172	62
December 1972	171	52
June 1973	184	68
December 1973	161	52
June 1974	170	60
December 1974	203	92
June 1975	217	82

[1] Median processing time in calendar days from receipt of request for hearing, or review, to disposition.
[2] Does not include SSI workload.

TABLE 6.—*Processing times: Median elapsed days for the period July 20–August 16, 1975—Bureau of Hearings and Appeals*

	This period	Last period
Hearing request to:		
Claim file received	21	21
Dismissal	189	174
Decision	228	220
Disposition (dismissals and decisions)	224	216
Hearing request to disposition by region:		
Boston	287	267
New York	218	224
Philadelphia	258	244
Atlanta	196	197
Chicago	266	265
Dallas	172	174
Kansas City	231	237
Denver	302	264
San Francisco	238	220
Seattle	210	169

NOTE: SST processing times are not available and are not reflected in totals.

TABLE 7.—*Request for hearing: Receipts, processed, and pending—total cases—Bureau of Hearings and Appeals*

Fiscal year	Receipts	Processed	Pending
1970	42, 573	38, 480	13, 747
1971	52, 427	45, 301	20, 873
1972	103, 691	61, 030	63, 534
1973	72, 202	[1] 68, 356	36, 78[illegible]
1974	121, 504	[2] 80, 783	77, 233
1975	154, 945	121, 009	111, 169

[1] Excludes 30,600 black lung cases transferred back to BDI.
[2] Excludes 268 black lung cases transferred back to BDI.

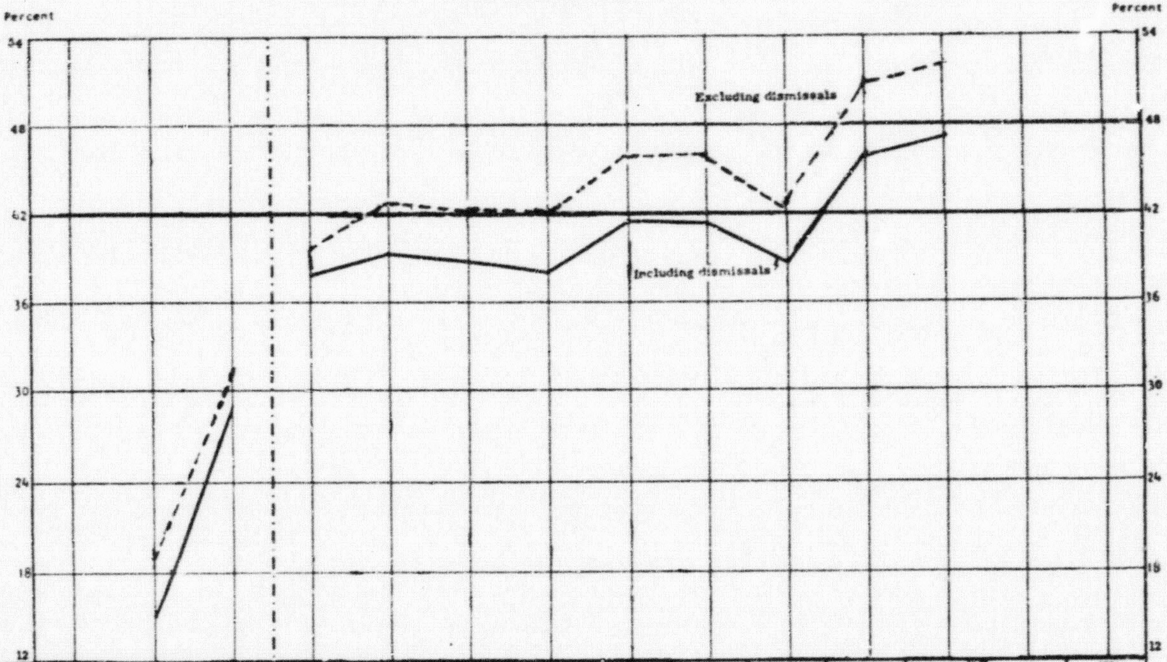
TABLE 8.—*Disposition of requests for hearing*[1]*—Fiscal year 1975*[2]

	Title II and XVIII				Black lung	Title II/ Title XVI	Title XVI	Total
	DIB	DWIB	RSI	HI				
Opening pending	37, 268	1, 972	1, 652	1, 454	33, 292	554	1, 041	77, 233
Receipts	74, 855	3, 550	2, 640	1, 485	19, 515	24, 223	28, 677	154, 945
Processed	63, 454	3, 070	2, 712	2, 141	28, 492	8, 463	12, 677	121, 009
Closing pending	48, 669	2, 452	1, 580	798	24, 315	16, 314	17, 041	111, 169

[1] May be subject to minor adjustments.
[2] Estimated, based on 1st 8 reporting periods (July 1974 to February 1975).

TABLE 9.—*Administrative law judge hearings—percent favorable to claimant actions*

[Fiscal years 1955–74]



CATEGORY	1955	1960	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974 3/	1975	1976
Inc. dis. 1/	NA	15.2%	28.9%	37.7%	39.5%	38.8%	38.2%	41.6%	41.3%	38.6%	46.0%	47.1%		
Exc. dis. 2/	NA	19.3%	31.6%	40.8%	42.8%	42.2%	42.0%	46.3%	46.3%	42.7%	51.5%	52.1%		

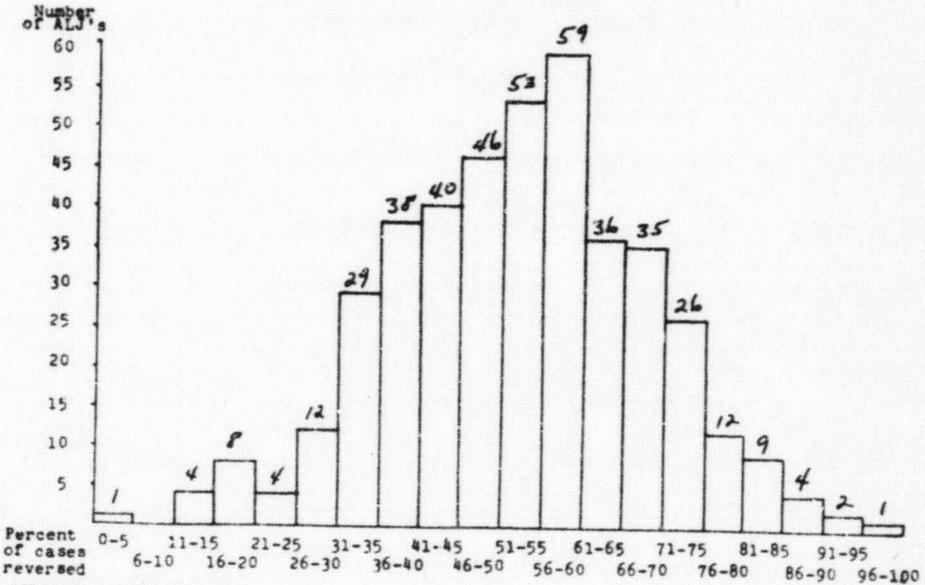
SOURCE: Budget Management Section   NA-Not Available

1/ Reversals as a percent of the total cases decided and dismissed.

2/ Reversals as a percent of the total cases decided, but excluding cases dismissed.

3/ 1974 figures exclude 14,781 Black Lung cases and 121 SSI cases.

TABLE 10.—*Nationwide title II reversal rate of 419 GS–15 ALJ's*—From January 6, 1974, to June 22, 1974*



*Full time, fully trained.

TABLE 11.—*Request for hearing: Reversal rate—Bureau of Hearings and Appeals*

[Expressed in percentage of total cases processed]

Fiscal year	DIB	Title II and XVIII		HI	Black lung	Title II/title XVI	Title XVI	Total
		DWIB	RSI					
1970	44. 4	29. 7	27. 8	29. 0				41. 6
1971	44. 4	26. 8	27. 2	28. 5				41. 5
1972	45. 2	25. 0	26. 3	35. 6	9. 8			38. 6
1973	46. 8	27. 7	28. 8	42. 2	76. 4			46. 0
1974	48. 5	28. 3	33. 8	50. 8	16. 7	(1)	(1)	41. 6
1975	[2] 50. 2	[2] 29. 8	[2] 35. 3	[2] 51. 1	22. 3	51. 2	42. 1	41. 9

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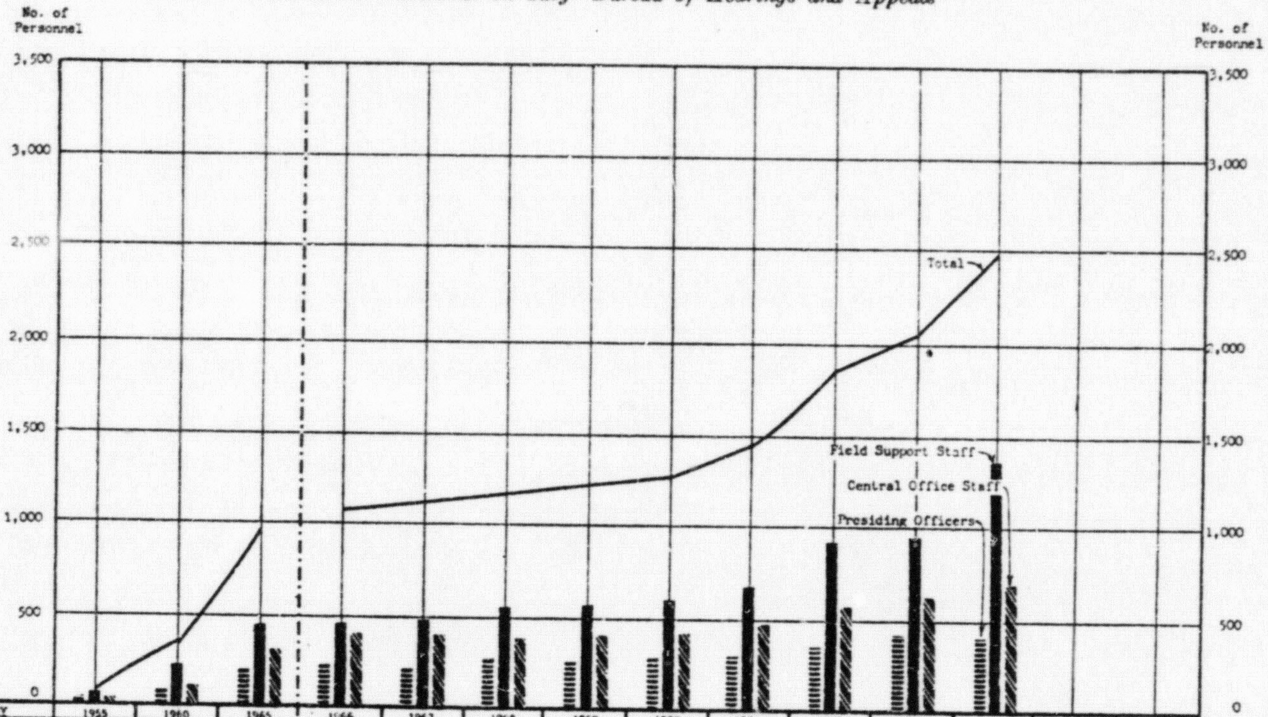
[1] Break-out of title II/title XVI and title XVI cases is not available. For the 2 programs combined it was 27.3 percent.

[2] Estimated based on 1st 8 reporting periods experience.

TABLE 12.—*Personnel on duty—Bureau of Hearings and Appeals*



CATEGORY	1955	1960	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
ALJ (REG)	23	93	216	230	219	256	252	278	295	348	424	419	442	
ALJ (BL L'NG)										(44)	(38)	(84)	(96)	
HEAR'G EXAM													114	
FD SUPT STF	47	224	434	472	498	556	567	590	661	933	1,006	1,366		
CENT OFF STF	19	109	311	412	398	385	406	410	476	573	614	699		
TOTAL	89	426	961	1,114	1,115	1,197	1,225	1,278	1,432	1,854	2,044	2,484		
PO CLASSES		30	22	24		40		32	29	134*	104	75**		

SOURCE: Staffing Report, Financial Management Branch

NOTE 1. Personnel are defined as permanent, full-time, on-duty personnel and include LWOPs.

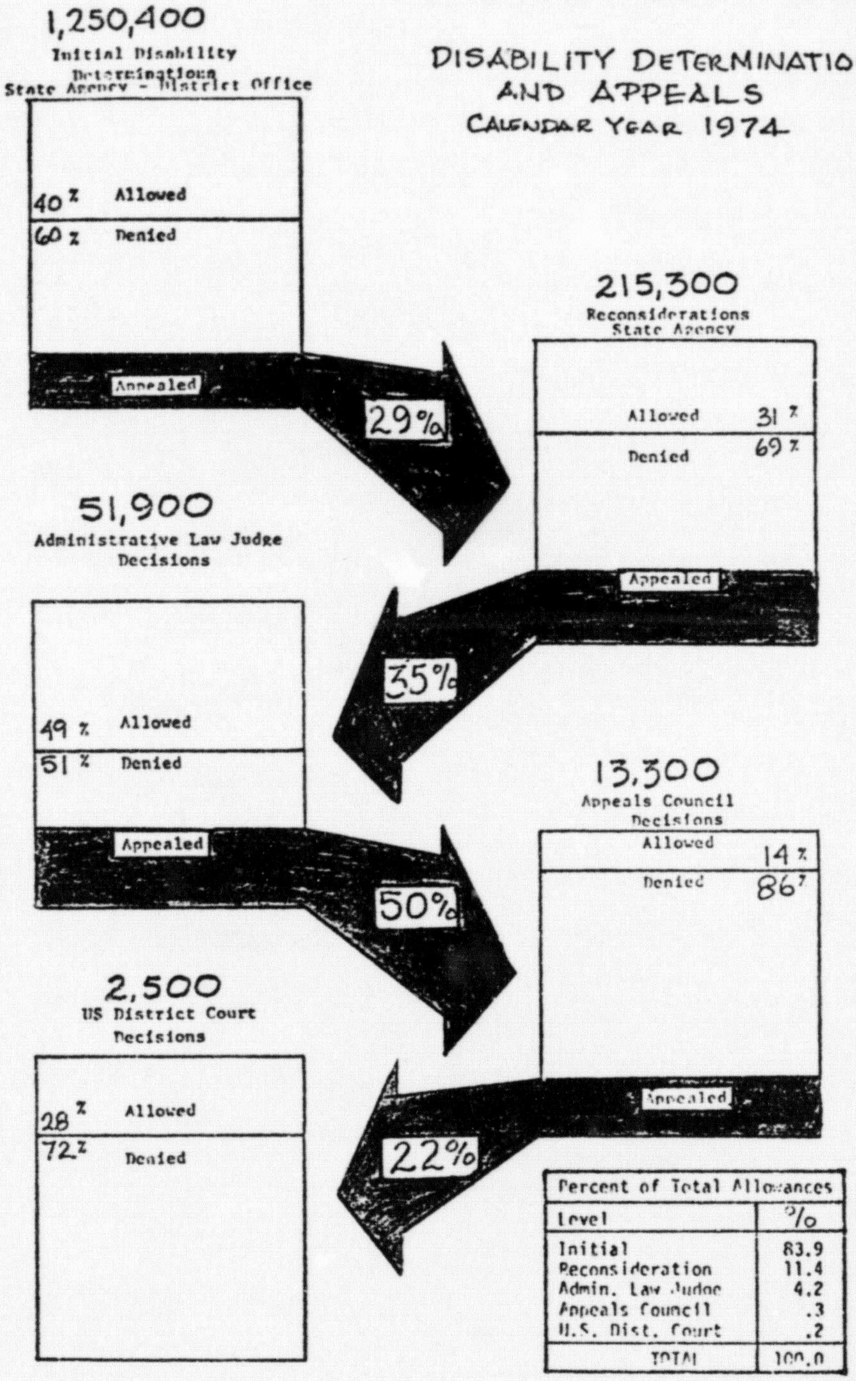
NOTE 2. Black Lung ALJ's are in parentheses to designate them as temporary and not included in the total.

NOTE 3. Data for presiding officer classes are not plotted.

* Includes 44 temporary and 90 permanent positions.

** Includes 54 temporary and 21 permanent positions.

DISABILITY DETERMINATIONS AND APPEALS
CALENDAR YEAR 1974


1,250,400
Initial Disability Determinations State Agency - District Office
40 % Allowed
60 % Denied
Appealed
29%
215,300
Reconsiderations State Agency
Allowed 31 %
Denied 69 %
Appealed
35%
51,900
Administrative Law Judge Decisions
49 % Allowed
51 % Denied
Appealed
50%
13,300
Appeals Council Decisions
Allowed 14 %
Denied 86 %
Appealed
22%
2,500
US District Court Decisions
28 % Allowed
72 % Denied

Percent of Total Allowances

Level	%
Initial	83.9
Reconsideration	11.4
Admin. Law Judge	4.2
Appeals Council	.3
U.S. Dist. Court	.2
TOTAL	100.0

Mr. BURKE. Our witnesses today are from the Social Security Administration and the Civil Service Commission. We will hear first from James B. Cardwell, Social Security Commissioner, and Robert B. Trachtenberg, Director of the Bureau of Hearings and Appeals. I think it will expedite the hearing and provide for a better discussion of the issues if we then allow Mr. Dullea, representing the CSC to make his direct statement and then we will go to questions.

STATEMENT OF HON. JAMES B. CARDWELL, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ACCOMPANIED BY ROBERT L. TRACHTENBERG, DIRECTOR, BUREAU OF HEARINGS AND APPEALS, AND CHAIRMAN OF THE APPEALS COUNCIL; SAMUEL E. CROUCH, ACTING DIRECTOR, BUREAU OF DISABILITY INSURANCE; AND DONALD A. GONYA, DEPUTY ASSISTANT GENERAL COUNSEL FOR SOCIAL SECURITY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Mr. CARDWELL. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate the opportunity to appear before the subcommittee to discuss the appeals process as it affects the programs administered by the Social Security Administration—particularly the disability aspect of these programs.

I am accompanied by Robert L. Trachtenberg, the new Director of the Bureau of Hearings and Appeals and Chairman of the Appeals Council; Samuel E. Crouch, Acting Director, Bureau of Disability Insurance, and Donald A. Gonya, Deputy Assistant General Counsel for Social Security of the Department of Health, Education, and Welfare.

In order to place my statement in perspective, I would like to outline the major categories I will discuss: (1) The backlog at the hearings level and our perception of its causes; (2) our view of administrative, management, and programmatic initiatives needed to deal with the backlog; (3) the current status of the hearings process and the outlook for the future; and (4) a discussion of the reversal rate at the hearings level, a point that you have already mentioned, Mr. Chairman.

Before going into detail, it might be useful as background if we were to describe briefly the hearings and appeals process itself.

It all starts with the fact that a claimant who has been denied at the initial determination level, and again upon reconsideration, has a right to have his claim reviewed at an evidentiary hearing by an impartial individual who was not part of the initial and reconsideration process. It is this latter right that results in the hearings and appeals process. Depending on which program is involved—regular social security, black lung, or SSI—the impartial review will be conducted by either an administrative law judge or a hearing examiner—terms I will explain later in my statement.

At the hearing itself, the claimant is entitled to representation. In contrast, the Government is not represented by its own counsel.

A verbatim transcript of the hearing is taken, documentary evidence is received, and oral testimony is heard from the claimant. Often, at the option of either the claimant or the hearings officer, testimony is heard from a vocational expert, a medical adviser, or both.

The hearings officer then issues a written decision, either affirming, modifying, or reversing the lower level decision. If the claimant is dissatisfied with the hearings officer's decision, he still has the right to a third and final level of administrative appeal—an appeal to the Social Security Appeals Council. The Council will review the case de novo if it involves OASDHI matters or on the basis of substantial evidence if it involves the SSI program. A decision by the Appeals Council represents the final administrative decision and is made on behalf of the Secretary of Health, Education, and Welfare.

If the claimant is still dissatisfied, he has the right to file a civil action in the appropriate U.S. District Court.

A claimant has 6 months within which to exercise his right to a reconsideration of any original adverse decision by SSA. He also has 6 months within which to exercise his right to a hearing within the hearings and appeals process and 60 days within which to exercise his right to be heard by the Appeals Council. Once all administrative remedies have been exhausted, he has another 60 days within which to appeal to the Federal court.

HEARINGS BACKLOG

With that brief background, permit me to move to the No. 1 problem of the moment—the backlog at the hearings and appeals level within the Social Security Administration.

We see the reasons for the backlog to be: (1) a one-time large volume of black lung cases and the advent of the SSI program at a time when the OASDHI program was experiencing rapid growth; (2) increased public awareness of social security programs in general, and the appeals process in particular, and increased representation by attorneys; (3) the individualized nature of the hearings, which causes a conflict between a high-volume workload and speedy case processing; and (4) looking at the matter from our own perspective within the Social Security Administration, impediments resulting from the way in which the Government assigns manpower to the process.

At the present time we have about 107,000 hearings requests pending before the Bureau of Hearings and Appeals. The median processing time for disability hearings in July 1975, for example, was about 7 months. Mr. Chairman, you have already pointed out that over half of those cases would obviously take longer than 7 months, and there are many extreme examples, including one that you pointed out, going beyond a year.

The backlog is the problem with which we must deal first. It is the problem to which we are giving our first attention through organizational, administrative, and management changes and improvements.

Shorter processing time is our objective. The shorter the processing time, the sooner we will have eliminated the backlog.

I would now like to discuss in some depth the reasons for the backlog as outlined above.

ADVENT OF NEW PROGRAMS

In recent years, as you know, a number of important and extensive programs have been added to the responsibilities of the Social Security

Administration. These changes have impacted the hearings caseload. In 1965 came the Medicare program, and then, in rapid succession, the original black lung program in 1969, the amendments to it in 1972, and the supplemental security income program for the aged, disabled, and blind in 1974.

In the same period, of course, the social security cash benefits program was growing. Applications for social security disability benefits, for example, have increased substantially over the past several years—from an annual rate of 780,000 in 1970 to an annual rate of 1.2 million in 1974.

Of course, it should have been expected that, as the responsibilities of the Social Security Administration have grown and the beneficiary population grew, the number of appeals it had to deal with would grow.

The number of hearings requests filed has increased from 42,573 in fiscal year 1970 to 154,945 in fiscal year 1975, and we anticipate approximately 141,000 will be filed in fiscal year 1976. Pending hearing cases have steadily increased since 1973, reaching a total of 77,233 as of June 30, 1974, and a high of over 113,000 in April 1975.

A substantial part of the present backlog has been the result of a one-time large volume of black lung hearings requests. During fiscal years 1973, 1974, and 1975, we received 70,500 black lung requests for hearings. As you know, SSA responsibility for receiving and processing claims under the black lung program has terminated. However, we are still faced with hearing requests filed in connection with those claims, and we had a pending black lung hearings workload of 17,857 as of September 13, 1975.

In addition, with the advent of the SSI program in January 1974, a new workload has developed at the hearings level. More than 28,500 SSI hearings requests, plus an additional 24,200 SSI–OASDHI requests for hearings were filed in fiscal year 1975.

INCREASED PUBLIC AWARENESS

In examining causes of the backlog, we should not ignore the phenomenon of increased public awareness, as we find in other programs, of the existence of the social security programs, and the capacity of the Social Security Administration to be responsive to claims and appeals. For instance, disability hearings, which constitute, by far, the largest part of the hearings workload, showed receipts of 36,000 in fiscal year 1973 and 75,000 in fiscal year 1975.

The value of the benefits payable to most disabled workers and their families, as well as the availability of Medicare protection, once a person becomes entitled to a disability benefit have led not only to an increase in the number of applicants for disability benefits but also to persistence in the pursuit of claims. More claimants seek legal representation in pursuing their claims and attorney interest in taking such cases has clearly increased.

With respect to increased attorney representation and other forms of representation, it should be noted that there has been an increase of 14 percent in attorney representation since fiscal year 1973, and an increase of 20 percent in all forms of representation during the same period. There is now some form of representation in 48 percent of all cases. Moreover, we have seen an increase in representation by federally and State-supported legal services programs.

CLASSES OF HEARINGS OFFICERS, EACH WITH DIFFERENT JURISDICTIONS

This is a subject of great concern to us. In dealing with new hearings requests, we have been severely hampered by the necessity of working with three distinct categories of hearings officers. We have administrative law judges (AIJ's) appointed under the Administrative Procedure Act, who are only supposed to hear cases under OASDHI; temporary black lung ALJ's who hear only black lung cases; and SSI hearing examiners who can only hear SSI cases. In other words, we are limited in our authority to assign these hearing officers to the multiple programs.

You will, Mr. Chairman, hear a great deal about the problems this causes as we proceed, both from our own point of view and from the point of view of the Civil Service Commission. The result has been from our point of view a tremendous strain on the regular ALJ corps because, lacking the flexibility of a single integrated corps, the regular ALJ's have had to hear a large number of cases which, strictly speaking, were not within the purview of their appointments as ALJ's.

For instance, until we were able to hire a sufficient number of temporary black lung ALJ's, whose work is classified at the GS–14 level, the regular GS–15 ALJ's had to assume the burden of holding over 17,000 black lung hearings cases.

We do not plan any further use of regular ALJ's to dispose of the black lung backlog, except in some isolated cases. Moreover, we expect to complete all black lung hearings by early 1976. We do see that problem as generally coming into control and it is almost behind us.

As another example, the number of concurrent SSI–OASDHI claims, where we have to consider whether the claimant has an entitlement under either or both of the authorities, is steadily increasing and it is now 60 percent of all SSI hearings requests. The SSI hearing examiner (who is able to hear only SSI cases because of a ruling by the Civil Service Commission that SSI hearings do not require ALJ's who are appointed under the provisions of the Administrative Procedure Act) cannot be effectively used in these concurrent cases, unless we require the claimant to appear at two hearings—the SSI hearing before a hearing examiner and the OASDHI case before a regular ALJ. In this same regard, using a regular ALJ in the concurrent case means that he is technically performing, as to the SSI issue, work outside of the scope of his appointment, since he has been hired to handle cases within the purview of the Administrative Procedure Act.

NATURE OF HEARING PROCESS

As already noted, the nature of the hearings process limits our capability to deal with pending workloads. The present system, with the need to establish an evidentiary record which must be able to withstand judicial scrutiny, is a time-consuming and expensive process under the best conditions. Each hearing must be handled individually as a strictly human endeavor. An automated, electronic, or other mass production system is not possible although support systems are possible. Thus, the time and staff expended is grossly disproportionate to the volume involved.

The human nature of the process has a profound influence upon the backlog, limits our capacity to deal with high workloads, and does not lend itself to the establishment of clear-cut processing goals. Nevertheless, I believe it is necessary in this, or any program, to establish such goals, even though it is recognized that such goals may be difficult to achieve.

It is our objective to provide every individual with a hearing decision within 90 days of the request for hearing, excluding and barring any delays caused by the individual or by the need for a consultative medical examination, two circumstances which will by their nature require more time.

As already noted, our present median processing time is 7 months from hearings request to decision. It should also be noted that the agency has never been able to meet a 90-day median processing time even before the onset of the new workloads described earlier. In 1968 and 1969, we did reach 95 days, however. Nevertheless, I believe, with the successful implementation of the initiatives described later in this statement, a 90-day waiting period represents the optimum ultimate goal in a disability program where: Hearings are held locally; sufficient notice of the hearing must be provided; arrangements must be made for the appearance of a medical adviser or vocational expert—where required; consultative examinations must be ordered—where appropriate; and a well-reasoned decision must be rendered based on a sound record.

Finally, no discussion of the nature of the process should be concluded without a recognition of the fact that the process is costly. The direct cost to the Government for the average hearing is now in excess of $400 and it is going to go up. In addition, there are many indirect costs, including those incurred by local social security officers and State agencies in securing additional evidence for the hearings officers and in assisting claimants in pursuing their rights.

No one, of course, knows how to quantify the cost to the claimant.

To process the projected hearings and appeals workloads, the Bureau of Hearings and Appeals will require annually—and this is why the cost will go up—more than 4,000 man-years and a budget in excess of $100 million. By many standards, this would appear excessive for the processing of 150,000 hearings requests to conclusion.

OPPORTUNITIES FOR OPERATIONAL IMPROVEMENTS

In our judgment, there is not much room within the hearing process per se for significant and practical change or improvement that would affect either the volume of cases coming into the process or the time frames within which they might be adjudicated. We seem to have but two choices. First, we can increase the productivity of the hearings officers and other staff who carry out the process. The second way to influence the backlog would, of course, be to influence the number of appeals being made in the first place. To do this, we must look at the prehearings activities and the way in which we conduct them to determine whether cases now going to a hearing might not be better settled at an earlier stage. Thus, initiatives taken or planned to be taken to reduce the backlog approach the overall problem from these two directions:

First: We are taking steps to increase the productivity of our hearings officers.

Second: At the same time we are initiating a number of changes designed to reduce the number of hearings requests filed.

STEPS TO INCREASE PRODUCTIVITY

As to efforts to increase productivity, there are a number of initiatives. The most significant are: (1) Additional staff; (2) removal of ALJ's and hearing examiners from nonjudicial functions, to clear away their assignments, so their assignments are focused more precisely on the basic rudiments of their share of the process; and (3) additional equipment and other resources which are being made available to hearings offices.

ADDITIONAL STAFF

At the present time, the Bureau of Hearings and Appeals, which is the organization within the Social Security Administration responsible for the administrative and programmatic direction of the hearings and appeals process, has 3,200 full-time permanent employees, of which 2,030 are in the hearings offices. Of the latter, we have 436 administrative law judges, 124 hearing examiners, and 95 temporary administrative law judges.

Included in these numbers are 62 administrative law judges and 37 hearing examiners who were appointed in the first half of 1975 and who will soon be reaching full productivity, which normally takes 9 months from the date of appointment. We have, in addition, recently requested a certificate to fill an additional 56 ALJ positions as soon as possible.

At this point, I should mention that we have attempted to appoint additional ALJ's in the numbers we believe are needed. However, the last register supplied to meet our need for 75 new ALJ's was not sufficiently extensive to enable us to appoint ALJ's to certain hard-to-fill offices in certain geographical locations. We were able to appoint only 43, considerably below our demonstrated needs. We are working with the Civil Service Commission to find ways to increase the size of the register and to secure ALJ's for the neediest offices.

The recruitment and placement process itself is proving to be cumbersome in our opinion.

Additional position allocations have been made available to the Bureau of Hearings and Appeals and, as a result, 258 additional support personnel were authorized to those hearings officers who had demonstrated that they could dispose of more cases with such assistance. Further, a substantial number of hearings and appeals analysts from BHA's central office were detailed to the field to assist hearings officers in drafting decisions and obtaining needed additional evidence. Also, about 200 staff attorneys were appointed to provide professional assistance to hearings officers.

REMOVAL OF THE ALJ [illegible] HEARING EXAMINER FROM NONJUDICIAL FUNCTIONS

An integral relationship exists between programmatic improvements and manpower additions and the obvious need to remove the administrative law judge from as many nonjudicial functions as possible, and thereby permit that individual to devote as much of his time as possible to hearing cases and rendering decisions.

From the manpower standpoint, this will be accomplished by (1) placing administrative officers in the larger hearings offices, thus alleviating many of the administrative duties that have befallen to ALJ's, and (2) increasing the support staff available to the ALJ to prepare cases for hearing and to issue the decision promptly, including the assignment of 200 law clerks and recent law school graduates to individual hearings officers.

From the programmatic standpoint, we have taken a number of steps designed to improve the quality of the documented record established at the initial and reconsideration levels, and thus extricate the hearings officer from much of the case development work which could have been developed at an earlier stage in the review process. I will touch upon these initiatives later in this statement.

ADDITIONAL EQUIPMENT AND OTHER RESOURCES

We have upgraded the quality of the office equipment available to hearings officers, including the placement of over 90 mag card machines in hearings offices so that the rendering of the decisions may be expedited. In addition, we have installed the first step of a case control and case locator system, and already have placed computer terminals in each of our regional offices. This automated system will allow for greater management control over the caseload, permit us to be more responsive to the Congress on the status of cases, and, we would hope, reduce the volume of reporting required in the hearings offices themselves.

REDUCING THE NUMBER OF APPEALS

As I stated before, the need is to not only increase productivity but also reduce the number of cases in which a hearing is requested. We have taken, or plan to take, a number of steps in this direction.

SCREENING OF PENDING DISABILITY APPEALS

Experience shows that a substantial number of reversals at the hearings level result from further deterioration of impairments with the passage of time following the reconsideration determination as made on a prehearing basis, and also from the receipt of new and material evidence affecting the status of the individual. Based on this experience, almost 40,000 disability cases pending at the hearings level were screened by disability examiners to identify cases which would be allowed (or otherwise disposed of) based on the evidence currently of record, and cases in which additional development could result in a favorable decision. It appears that, when final actions have been completed, more than 5,000 cases out of the 40,000 will have been removed from the hearings backlog by favorable decisions without the need for a hearing. An additional 5,000 will be better prepared for a hearing and thus should expedite the hearing because of the additional development undertaken.

INFORMAL REMAND PROCESS

As a sequel to the screening project, BHA and BDI are now testing nationally a new process—the "informal remand" of disability cases. This process calls for the referral of certain disability cases from field offices to State agencies after the claimant has requested a hearing but before the case is forwarded to the hearings officer. We estimate that as many as 72,000 new hearings requests will be reviewed by State agencies under this process in fiscal year 1976.

FACE-TO-FACE INTERVIEWS WITH DECISIONMAKERS

As the staff report has pointed out to the committee, we have also been testing a new procedure of face-to-face interviews between the claimant and the decisionmaker before the case gets to a hearing. It offers the claimant, whose application was denied and who requested reconsideration, the opportunity to discuss his case fully and completely with a State agency decisionmaker. By involving the claimant more fully in the decisionmaking process at that level, we hope to identify, at an earlier point in time, those claims that should be paid.

Additionally, where the decision is adverse, we expect the claimant to be more satisfied that he has been given a "fair shake" and will be less likely to request a hearing, which would not serve a very useful purpose. Of course, for those who do request a hearing, the file will be more fully documented.

REDUCING THE PERIOD IN WHICH THE HEARING MAY BE REQUESTED

Consideration should also be given to a change in the law which would reduce the period in which a claimant may request a hearing. After an initial adverse decision, the claimant has 6 months in which to request reconsideration of that decision. He also has another 6 months if his reconsideration produces a denial in which to decide whether to go to a formal appeal. If he has been denied under the appeals process he has 60 days in which to ask for review by the SSA Appeals Council. If he is turned down at that point, and by that point he will have exhausted all his administrative remedies under existing law, he has 60 days in which to decide whether to go to court. In other words, we have two 6-month periods and two 60-day periods. Our recommendation is that the whole process be set on a 60-day basis.

We believe this would not only have an improved effect on the present high reversal rate, a matter I will discuss shortly, but it should also reduce the number of requests for hearings filed. Under such a reduction of the appellate period, where there is new and material evidence, or worsening of the claimant's condition, the claimant could file a new application, and his claim would be adjudicated at an initial level rather than at a costly and time-consuming appellate level.

In our judgment this change would not deny due process.

CURRENT OUTLOOK

Mr. Chairman, to use an oft used phrase, I hold a degree of guarded optimism based upon the preliminary results of our initiatives over the past 9 months. Mr. Chairman, I would like to emphasize at this point that if any significant change has occurred during that period it has really been as a result of the assignment of Bob Trachtenberg, the new Director of the Bureau, to the Bureau of Hearings and Appeals. The record shows that, since his assignment, things have begun to happen. To place this statement in perspective, one must recognize that the backlog as of April 1975 was over 113,000 and, frankly, many within SSA felt that the net backlog was destined to rise even further. Indeed, had not some bold and creative steps been taken by Bob and his staff beginning in January 1975, we could be faced today with a backlog of over 130,000 or more cases. That is the rate at which it was then growing. Instead, I can report that there has been not only a stabilization of the backlog but also a net decline, at the rate of 1,000 cases per month. Thus, we have now a backlog of slightly under 107,000 cases.

I certainly recognize that a decline of only 1,000 cases per month will not eliminate the backlog quickly enough and, likewise, will not reduce processing time to within reach of the goals that have been set. I have hope that, with additional staff, productivity levels can be sustained at their current levels and indeed increased. What we do not yet know is the impact of the programmatic initiatives which I discussed earlier. We do not know if such procedures as informal remands and face-to-face interviews will significantly reduce the number of hearings requested. We assume that they will. If these efforts produce positive results, we can control the backlog sooner and also improve processing times more rapidly.

RATE OF DISABILITY REVERSALS AT THE HEARINGS LEVEL

Any discussion of the hearings backlog would not be complete without recognition of the relationship between a high reversal rate and heavy workloads. The committee has before it a good deal of information about this phenomenon.

In this regard, we cannot disregard the fact that, in disability cases, the claimant's condition worsens with time. Thus, the delay in rendering the hearing decision, in many cases, results in a claimant who is more disabled at the hearings level than he was when his claim was reviewed at the reconsideration level. We believe that improvements in the processing time will make the factual case decided at the hearings level more similar to the one which was reviewed upon reconsideration. The longer we stretch out the process time, the more likely we are to find differing circumstances. Also, I believe, as I have indicated earlier, that reducing the period in which an individual may request a hearing will improve the reversal rate.

The reversal rate—now approximately 50 percent—is, of course, disturbing, since it seems to indicate, on its face, that there should be more favorable decisions at a lower level. However, the rate must be considered in the light of several important factors, not all of which are fully understood.

First: In evaluating disability, various judgmental, interrelated medical, vocational, and educational factors must be considered. The multiplicity of these factors accounts for differing actions at differing times and differing levels.

Second: We are evaluating a particular person—not an average person, and each person is somewhat different—and the uniqueness of this individual can be brought into better focus in the individualized hearing process.

Third: In most instances the claimant and the decisionmaker first come face to face only at the hearings level. This provides the decisionmaker with the best opportunity to observe the claimant and to fully inquire into the person's condition. All these factors, in my opinion, play a significant role in the reversal rate, and thus a favorable decision at the hearings level does not necessarily mean that the prior decision was in error at the time made.

While these are the factors which I believe have an impact on the reversal rate, it should be observed that there are subtleties in the process which are undeterminable and largely uncontrollable, and which affect the reversal rate. The conditioning, the value set, the social outlook of the hearings officer in contrast to those same factors present in the original adjudicator can make a difference.

For instance, the education and background of the hearings officer is a factor. His concern about being reversed at the appeals council or district court level may also be a factor. For instance, there are such things as "paying" judges and "denying" judges. There are other such subtleties, all of which suggest that, in a system of jurisprudence and particularly in a disability program where the uniqueness of facts and not the law control the outcome of so many cases, we should expect a wide variance in judgmental decisionmaking.

We are striving to improve the consistency in decisionmaking at all levels by expanding the regulations to provide more definitive guidelines on the effect of adverse vocational factors in the evaluation of disability. Our hope is that by doing this we will smooth out some of the inconsistencies between regions and geographical centers and between individuals.

While we believe that this should provide more consistency, judgmental findings of fact will still have to be made and reasonable men can still arrive at different findings. We do not believe that truly consistent decisions can be achieved where findings of fact must be made as to an individual's residual capacity based on complex medical evidence, and other sometimes contradictory evidence. Based on the determined residual capacity, a judgmental finding must be made as to what jobs, if any, exist in significant numbers in the national economy which the particular individual can perform, considering age, education, and work experience. The courts in the various judicial districts have arrived at different decisions in cases where the pertinent facts were similar. We are, however, gratified that in fiscal year 1975, the courts found in favor of the Department in 84 percent of the disability cases decided.

CONCLUSION

Mr. Chairman, although we have taken a number of steps to reduce the current backlog and these steps have been fairly successful, we are continuing to review the entire appeals process to determine what additional organizational, management, and administrative devices might be available to arrive at our goals more quickly.

The very size of the various social security programs, their social purposes, their applicability to all segments of the population, the effect benefits have on people's ability to provide for their basic needs, and many other reasons dictate that we provide an adequate and timely avenue of appeal where individuals do not agree with determinations made on their claims. The current processing time is unacceptable, but the potential for improvement exists if no new programs are added to the appellate processes and our initiatives prove to be as successful as, indeed, I hope they will be.

Mr. Chairman, that concludes may remarks. I would suggest that Mr. Trachtenberg and myself and the rest of us from Social Security make ourselves available for any questions that the committee might wish to ask.

Mr. BURKE. We will now recognize Mr. Dullea.

STATEMENT OF CHARLES J. DULLEA, DIRECTOR, OFFICE OF ADMINISTRATIVE LAW JUDGES, CIVIL SERVICE COMMISSION

Mr. DULLEA. Thank you, Mr. Chairman.

Mr. BURKE. Will you identify yourself for the record?

Mr. DULLEA. I am Charles J. Dullea, Director, Office of Administrative Law Judges, U.S. Civil Service Commission.

Mr. Chairman, my statement is quite brief. On the other hand, in the interest of time if you would care to have me just summarize or highlight what is in the statement I would be glad to do so.

Mr. BURKE. It is brief. You may take the time to read it.

Mr. DULLEA. Thank you.

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear at this hearing this morning. The subcommittee's concern about the backlog of cases pending in the Bureau of Hearings and Appeals and the time required to process them is shared by the Civil Service Commission.

The Commission does not have direct authority with respect to the hearings and appeals procedures and the manner in which the agency administers and manages its disability program. However, it would like to provide the subcommittee with any pertinent information or assistance that may be of help in expediting the adjudication of cases and reducing the backlog.

The disability program, which constitutes the bulk of the Agency's case load, affects a larger number of citizens than the programs administered by most other Federal agencies. Information available to the Commission indicates that the disability cases received under title II of the Social Security Act amounted to approximately 73,570 disability hearing cases in fiscal year 1974.

The Agency's backlog has developed over a period of time that has witnessed a vast expansion in the number of section 11 APA hearing examiners—now called administrative law judges—in the Social Security Administration. After implementation of the personnel provisions of the Administrative Procedure Act, the Agency employed some 15 referees.

Since that time there has been a 30-fold increase in the number of its presiding officers. Expansion in the early years after enactment of the act was slow. However, the increase in the number of presiding officers has doubled in the last 5 years to the point where the agency now employs about 440 presiding officers who adjudicate cases under title II and XVIII and it now has a certificate of eligibles in hand looking to the appointment of an additional 55 presiding officers.

Shortly the Agency's staff will number 500—without regard to some 150 officers who decide other types of cases—this 500 will represent 60 percent of all of the section 11 administrative law judges in 26 Federal agencies. Actually, the corps of presiding officers adjudicating disability cases in the Social Security Administration is larger than the entire Federal judiciary.

Despite this expansion of staff, the agency continues to be confronted with a heavy backlog of disability cases numbering approximately 70,000,[1] as of mid-August 1975. One-third of these on information available to the Commission have been pending for a period in excess of 6 months.

These factors have triggered the concern of many interested organizations, and recent years have witnessed a number of studies of the agency's processes seeking faster resolution of cases and the more effective utilization of its presiding officers. Within the last 5 years, for instance, two studies have been conducted by representatives for the Administrative Conference of the United States; one by a task force established at the direction of the Commissioner of Social Security; by the staff of the Committee on Ways and Means; by the Association of Administrative Law Judges in the Department; and by a study group established by the Civil Service Commission directed to the effectiveness of the utilization of administrative law judges. Additionally, an audit is presently being conducted by the General Accounting Office.

Since the expansion in presiding officer staff has been insufficient to cope with the intake of cases, most of these studies have focused on the procedures and processes followed in the adjudication of cases. Out of these studies have come a number of suggestions for changes in procedures in order to reduce the backlog, expedite adjudication, and achieve the more effective utilization of presiding officers. Among other things, the studies reflect the following concerns and recommendations:

One: The time periods provided claimants in which to seek review of the denial of an initial claim, and in which to request a formal hearing are unusually long—6 months after the initial denial in which to request reconsideration; and, if unsuccessful at the reconsideration level, an additional 6-month period in which to request a hearing.

Two: In recent years a reduction in the purchase of medical consultative examinations at the initial claims level. This has had an impact on the processing time and has been the cause for complaints by many of the agency's administrative law judges that they receive underdeveloped files prior to hearing which require the expenditure of their time on development work which should have been undertaken at the earliest stage in the claims process.

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[1] 53,000 title II disability causes, 17,000 others with disability issues.

Three: The lack of any face-to-face meeting, interview of conference between the claimant and a responsible deciding official at the initial claim stage, or at the second level of review, the reconsideration stage. The initial claim and the reconsidered determination are decided on the basis of a cold record.

Four: Contributing to the backlog of disability cases is the fact that in 1974, 400 administrative law judges were assigned to hear and decide 40 cases each in a different program area at a lower level of responsibility—cases arising under Public Law 91–173—black lung.

Five: A comprehensive questionnaire was submitted by the Civil Service Commission to 237 of the agency's presiding officers during the Commission's utilization study. A large number of these administrative law judges reported that a considerable amount of their time had to be expended in adequately developing case files which were underdeveloped at the two lower levels, that is, the initial claims stage and the reconsideration level.

Six: One study has questioned why administrative law judges cannot remand cases before a hearing when a new evidence is submitted and a decision on the record seems possible. We undertand, however, that HEW is now experimenting with an "informal remand" procedure.

In addition, there is concern about the rate of reversal at the third level or hearing stage, after initial consideration and reconsideration, which increased from 43 percent in 1972 to 51.5 percent of all cases heard in fiscal year 1973.

The Civil Service Commission is of the opinion that the public interest requires that these cases be resolved expeditiously and fairly. Since the Bureau's staff will shortly number approximately 500 administrative law judges, GS–15, the appointment of the additional 50 should contribute toward a reduction of the backlog of cases.

I would be pleased to answer any questions the subcommittee may have.

Mr. BURKE. Thank you.

Mr. DULLEA. Thank you.

Mr. BURKE. That completes the opening statements of the witnesses. Do you have questions, Mr. Archer?

Mr. ARCHER. Why are administrative law judge positions going unfilled, or did I understand your testimony incorrectly? I understood that you couldn't find the people to fill them?

Mr. CARDWELL. Our testimony was to the effect that the process itself does prove to be difficult when you start recruiting in the numbers which we are now recruiting. I think Mr. Dullea and Mr. Trachtenberg can speak to this. In my opinion, it has in part to do with the very stringent qualification requirements that the Administrative Procedure Act specifies.

I think that is probably the No. 1 cause. I would defer to those two gentlemen.

Mr. TRACHTENBERG. The Commissioner's reference was to filling 43 positions out of our last request for 75, which is what I think you refer to, Congressman. This basically occurred for a couple of reasons. There were some very good locations on the list and some locations that were hard to fill; for instance, some in cold climates in the Midwest. We got more than enough people off the register for the rather easy positions in Washington and areas like that but fell very short of our need in places like Lansing, Mich.

This is a function of supply and demand. The names are there but placing them where the need is is what is becoming the problem.

Mr. **Archer.** Is there any reason why the functions with respect to hearing cases under OASDI and SSI should not be combined?

Mr. **Cardwell.** I would encourage integration.

Mr. **Archer.** Can any one of you point out any reason why we should not do it? That seems to be one simple thing we could do.

Mr. **Cardwell.** I think the Civil Service Commission feels there is a defect, and the defect would be enlarged if we proceeded in that direction.

Mr. **Dullea.** Based upon the Commission's evaluation of the pertinent statutes, the enactment of title XVI, I believe in 1972, the Commission was requested to supply administrative law judges. However, based upon the provisions of the law there appeared to be an exception there. It was a very comprehensive review by the Commission's General Counsel and by the Office of Legal Counsel of the Department of Justice and based upon those opinions the Commission decided that title XVI, the way it was written, did not require the use of administrative law judges.

Mr. **Archer.** We have the power of changing the law. Is there any reason why we shouldn't change the law in this regard?

Mr. **Cardwell.** That is up to the Congress, sir.

Mr. **Archer.** This is my question. Is there some reason why we should not, by changing the law, integrate this process? If there is, what are the defects that would occur if we were to change the law?

Mr. **Cardwell.** Well, it would depend, sir, on the Congress enacting legislation without the exception that appeared in title XVI in 1972.

Mr. **Archer.** Yes, sir, I understand. That is why we are here today, to find out where we need to change the law. So there really are no objections, then, if we change the law? Is that an accurate understanding?

Mr. **Cardwell.** Mr. Archer, perhaps I will prove to be very unwise by taking this next step but it seems to me there are some objections that are not present in the HEW or Social Security Administration. However, for those who have concern about the quality of the Administrative Procedure Act and the quality of the national corps of administrative law judges, I think there is concern that the social security processes generally do not require application of this process, that it is an unnecessarily expensive approach to our particular requirements, and that it will in time dilute the quality of the total national corps. That is the impression I receive since I have been in social security, that there is outside of social security this concern that we are—and I use this word hesitatingly—corrupting the basic concept of the Administrative Procedure Act, that we are applying an approach to our particular hearings process that is excessive to the requirements of the process, and in many cases I think that is the issuse.

Our problem at the moment is that we have a very difficult job to do. It is a job that has been worsening with time and while we debate this other issue off to the side we have really lost time. We have an administrative law judge corps. It is already there. In our judgment, if our basic objective is to move on with the business of these hearings and appeals, our best course is to stay where we are, enlarge that corps, permit some flexibility in the application of that corps to our work, and go on with it. That is our position.

Mr. ARCHER. It seems to me that the reason we are here today is to find a process that is suitable for social security. I don't think we should have our feet set in concrete because there has been some traditional way of doing something that might exist outside of the Social Security system. If there is a better way to handle this process, in fairness to the claimant, and to do it expeditiously within the Social Security Administration, we should try to find that way. And if we have to change some of the things that have existed, we ought to be prepared to do it. We ought to hear testimony as to what changes we should make, and if they are revolutionary, if they are completely different, then I hope you gentlemen will give us the benefit of your thinking with respect to that, and not just say there is some structure outside the Social Security system that has some bearing on what we are going to do.

Mr. CARDWELL. Let me review then what I think the parties at interest are and identify their license. I think there are four parties at interest, the Social Security Administration itself, and I think we have made as clear as we know how our position on the matter. The Administrative Conference of the United States has a very basic interest in this matter. The Civil Service Commission certainly has an interest in it because they have been charged with administering the administrative law judge recruitment and placement provisions.

Finally, the administrative law judge corps itself, both within social security and among other Federal agencies, obviously has an interest because it is the quality of their own discipline that is viewed by many as being somewhat at stake or at issue. I can speak to our position. Our position is that we should build on our existing administrative law judge corps and that that corps should at least for this period of time, not necessarily forever, but at least for this period of time be able to review each and every kind and class of case that comes before our agency.

We could improve our performance if we had that flexibility. We now lack that flexibility.

Mr. ARCHER. I hate to belabor this, but I think it may lie at the core of a solution we are seeking. You have mentioned several parties at interest. You have not mentioned the taxpayer, who bears the cost of these programs. You have not mentioned the claimant. And to me, these are the two parties at interest who should be considered first.

We have a job to do here for two categories of people, the taxpayer and the beneficiary or claimant, and those are the only two that this committee ought to be concerned with if it is going to get at the nub of this problem.

Mr. CARDWELL. I think they are the people for whom you should establish the first priority. I think you have to be concerned about other people too, the people who do the job. Their attitude, their morale, also will redound to either the interest or the detriment of the claimant.

Our position is that the claimant would be better served at this time if we had the authority to make these assignments, but I am pointing out to you that there are others whose views should be solicited by this committee and should be given a chance to speak to them.

Mr. ARCHER. On page 17, Mr. Cardwell, you indicate that you want face-to-face contact with adjudicators and the State agencies. How are you going to do this in States which have highly centralized systems with maybe only one office in the State?

Mr. CARDWELL. That does prove to be a difficulty. It involves either moving out from that centralized facility to the claimant or bringing the claimant into that centralized point. It is a difficulty.

Mr. ARCHER. But you think this can be handled?

Mr. CARDWELL. We think we have to find a way to handle it. The real issue is will that make a difference to the hearings and appeals process? I think the general conclusion is that it can make a difference and thus it should be pursued. It does have a number of implied difficulties. You have mentioned one.

Another one is, and the committee should be very well aware of this, it will increase clearly, I think, the number of approved claims at that level and thus could add to the overall cost of the program. In theory one could say, well, aren't we just substituting? We are improving the case at that level rather than the later level. I don't know that arithmetic would prove that to be true over time. We would just be guessing if we told you that they would offset each other. My guess is that it will increase the total cost of the disability benefits program, and that I think is one of the things that the committee should think about, to be perhaps somewhat concerned about.

Mr. ARCHER. It has been said that the maximum average productivity of ALJ's is about one case per working day, or roughly 220 per year. Do you think this is a reasonable figure and how much leeway should be provided for ALJ's if such a standard were adopted?

Mr. CARDWELL. I would like Mr. Trachtenberg, who is the Director of the Bureau of Hearings and Appeals, to try to answer that question if you would permit him.

Mr. TRACHTENBERG. I think that is a reasonable standard. It falls somewhat short of the overall goals that are set forth in order to reduce the backlog as quickly as possible.

We are talking in terms of about 26 cases per month as the average. I think we can get there. We have many initiatives such as the staff attorney support program where there will be attorneys coming out of law school assigned to the judges to help them hear more cases and to issue more decisions.

It is very tough. It is a pressurized atmosphere to issue 20 decisions a month. There is no comparison,for instance, with the number of cases issued by the Social Security Administration per judge as compared to the economic regulatory agencies under the Administrative Procedure Act. We are talking about a completely different ball game, in effect. Twenty cases a month is a heavy workload. It is a lot of pressure. It is a lot of overtime, and it is not only pressure on the judges but pressure on the support people who serve the judges as well. The 20 cases is a recent high, by the way. When I first arrived we were somewhere between 14 and 15 cases.

Mr. ARCHER. To get at this backlog, aren't we talking about 1,300 decisions a year or something like that? How can an ALJ render 1,300 decisions?

Mr. **Trachtenberg.** We are not talking about 1,300 cases. We are talking about 300 decisions, 26 cases per month times 12 months, or somewhere over 300. I think that is within reach. Certainly there are administrative law judges now who have exceeded the 26 level.

Part of it is going to happen by virtue of putting more administrative law judges out there. Other parts will happen by virtue of the fact that more support people will be there to help the judges.

Mr. **Archer.** If you decide as a matter of policy to establish general production guides and try to enforce them, would coverage under the APA inhibit your action in this area?

Mr. **Trachtenberg.** I don't think the setting of goals and the development of finite quotas are the same. What we have I think any organization needs. You need to shoot for a goal.

You need to know where you want to be in a given period of time and then you want to set out your milestones to getting there. That is what we are doing now. The management efforts that we have started are designed to get the ALJ and the hearing examiner to his high water mark, and they are responding. These hearings officers of all categories that we have are professionals. They know what the needs are.

They know what the problem is. They know what the crisis is, and they are responding without the need for finite quotas where you "bang people over the head" for them to meet it. I don't think that in any judicial system quotas of that nature are adequate or appropriate because they tend to interfere with due process.

At the end of the month, if you are not at your 26 cases you have to pay these three or four or disallow three or four. You are not exercising due process. So it is a balance I am trying to achieve in the system.

Mr. **Archer.** Mr. Dullea, would you like to comment on Mr. Trachtenberg's last statement?

Mr. **Dullea.** I would like to pick up on something that Mr. Cardwell mentioned. He expressed outside concerns about the nature of the system. This has always been a matter of dialog and concern to the bar, to the administrative law judges, and to agency heads.

The thing has been debated for some years and, I think, one of the concerns is the nature of the social security procedure, it is not an adversary one. It is for this reason that, I think, Commissioner Cardwell earlier expressed those concerns. The decision was made some 27 years ago when the act was implemented to bring the hearing examiners in the Social Security Administration for personnel purposes under the Administrative Procedure Act. That has obtained ever since. It has always been debatable whether the substantive sections of the law applied to the procedure; in any event the personnel did. But it has always been a dialog in the bar.

I suspect some of the experts expected here next week will comment on this, the concern about due process and what the courts will say. But as Mr. Cardwell pointed out, in any event there is going to have to be a corps of officers to take care of these cases.

We have had this system for 27 years and as he indicated I think any dramatic change in it would have adverse effects. With respect to Mr. Trachtenberg's comments about productivity, our vantage point is remote. We are not in the day-to-day business of second-guessing the agencies' procedures and processing. As I have indicated, all the studies in this area for some years have seemed to have pinpointed the fact that there are changes that could be made.

Mr. Cardwell has spoken to some of them that could have these cases adjudicated at the earliest and quickest and most inexpensive level, the claims level or the reconsideration level. With regard to productivity at the upper echelons, I don't think this would be violative of any standard of the Administrative Procedure Act.

The regulations indicate that an agency cannot rate the performance of an administrative law judge. I think that is qualitative. I think the agency can properly look at the production of the ALJ. As Mr. Trachtenberg indicated they can probably set out some goals. As I look at it, and again from my vantage point, if a concentrated effort would be made at having these cases resolved at the early levels, for instance Mr. Cardwell spoke of it face-to-face. I indicated that the first and second level is decided on the cold level. The claimant files a claim and he sees no one. He files a request for reconsiderations within 6 months. He sees no one. The ALJ's tell me that the face-to-face meeting is vital. At this point you can get statements of complaint and subjective symptoms. This in large measure, I think, contributes to the reversal rate of 52 percent. I think face-to-face is vital.

From our vantage point if these procedures could be changed and as the Commissioner indicated, some of them are, I could see a sizable diminution of the case backlog. But we have this long period for reviews and no face-to-face meeting.

This is what happens at the final end of the process. The claimant goes in after a year and the ALJ hears his complaints and has developed a good deal of medical evidence on his own behalf. With that, we know how the reversal rate soars. I think if they could be done earlier the public interest would benefit.

Mr. Archer. Would you provide the committee with your recommendations as to how you would set up a hearing process if you were starting from scratch? With your knowledge, experience, and background, but without trying to get into the matter in depth now, would you provide this in writing to the committee?

Mr. Dullea. I will be glad to.

[See p. 528.]

Mr. Burke. Mr. Waggonner?

Mr. Waggonner. I will defer for the moment.

Mr. Burke. Mr. Jacobs.

Mr. Jacobs. Mr. Commissioner, did I understand you to say your goal is to reduce the year and 4 months to exhaust administrative remedies down to 60 days?

Mr. Cardwell. We said the mean time is about 7 months and our objective was to reduce it to 90 days.

Mr. Jacobs. But you were talking about the statutory limitations, 6, 60, and 60 would be a year and 4 months. You want to reduce that to what?

Mr. Cardwell. Let me review it.

Under the existing law a person who was denied his original claim——

Mr. Jacobs. We have that, 6, 6, 60, and 60.

Mr. Cardwell. But they are not uniform. We would make it 60, 60, 60, and 60.

Mr. **Jacobs.** In your 7 years of qualifying experience, who added the practice of law and if that has been added as experience is it also true that you lean only on trial experience rather than general practice of law? Is that true and if so, why?

Mr. **Dullea.** The Commission is required to establish the qualifying standards. Some 10 years ago in 1964 the standard was prior judicial experience or experience in administrative law. That obtained until 1968 or 1969 when the American Bar Association urged the Commission to broaden the standard and permit the general trial lawyer to file and be found eligible. That recommendation was then considered by the Administrative Conference. They endorsed it.

In 1970 the Commission broadened the standard to permit the preparation and trial of cases to constitute an additional ground for qualifying in the program. We have seen a marked change in the numbers of people and the sectors from which they come since that change was made.

Mr. **Jacobs.** Up or down?

Mr. **Dullea.** I have statistics in mind. In 1968 the ratio was much in favor of the Federal attorney. I think probably off the top of my head it is about 58 percent and the balance from other sectors.

In 1973, after the changes were made, the ratio fell. I think it was 31 percent from the Federal sector and the balance either from State or local agencies.

Mr. **Jacobs.** Did the balance do as well as the original?

Mr. **Dullea.** I will have to defer to Mr. Trachtenberg.

Mr. **Jacobs.** Do you know whether they do better or about the same, those who come in under the broadened qualifications?

Mr. **Trachtenberg.** No, I do not.

Mr. **Dullea.** I can quote Mr. Trachtenberg's predecessor that the trial lawyer has done as well as the administratively-trained lawyer.

Mr. **Jacobs.** Let me ask in triplicate, of the following qualifying experiences, do you have an opinion as to whether they should be included, (a) the general practitioner, regardless of percentage of trial experience, (b) an examiner on the State level for disability compensation, and (c) a staff attorney, for example, for the Ways and Means Committee, or a member?

Mr. **Dullea.** I'm going to get myself in trouble, I guess, when I respond to the third. With regard to the staff attorney on the committee, if his work for some number of years had been exclusively on the staff and that was the basis on which he came to the Commission, I would have to say he would be found ineligible.

Mr. **Jacobs.** I know that he would be under the present rules. But do you have an opinion as to whether those rules should be expanded?

Mr. **Dullea.** As I have indicated in my prepared statement, the Commission undertook a study here about a year ago about the effectiveness of the utilization of ALJ's. It was not limited to the social security process. They touched on a variety of issues, classification, unified corps of personnel, recruitment and standards. It was staffed by 11 ALJ's under the direction of the Commission's Deputy General Counsel. It had input from agency managers, practitioners, and interested bar associations. The general consensus was that the standards were acceptable to all and satisfactory.

Mr. JACOBS. They were happy with it. Now there is a bill before the Congress, H.R. 8911, that for temporary ALJ's would require 5 years practice of law or 5 years experience, it says here in adjudication or consideration of Social Security Act claims. Do you have an opinion as to the worth of that legislation?

Mr. DULLEA. With respect to the legislation, I would have an opinion. I don't, sir, feel that it is consistent with the Administrative Procedure Act or with the legislative history that led to the enactment of the APA, but in terms of the level of work involved, if it were just devoted to the work under the supplemental security income program, that has been looked at a lower grade level. I would not quibble with a 5-year standard of experience for work at the GS-13 grade level.

Mr. JACOBS. Two final things: One just looking over this announcement here, 318 from the U.S. Civil Service Commission, one finds on page 6 a rather lopsided reference to experience in regulatory bodies. Why it that? Or am I seeing things?

Mr. DULLEA. We service, as I stated earlier, some 26 or 27 agencies. There are in all in excess of 800 administrative law judges in the government. We service the NLRB, SEC, CAB, and such. The work is adjudicatory, it is quasi-judicial. Those who have had prior experience in the Federal sector, State or local bodies have experience that is job-related. This is why that, among other standards, would qualify one to become an administrative law judge.

Mr. JACOBS. I must say as a puzzled person that it seems to me that experience in regulating the gas company or regulating the oil business—and I bow to the Southwest—as a qualifying experience to her grandmother's social security problem, I just don't understand it. It strikes me like calling in a butcher to do brain surgery.

Mr. DULLEA. I think you have to recognize that some of these agencies are classified as a higher grade level, like GS-16. The applicant from the State Public Service Commission with a background in utility law would probably end up on the GS-16 register and would operate at the Federal Power Commission. We are talking about GS-15 which applies to social security.

The Department of Labor, Coast Guard and I think probably 10 or 11 agencies are classified as GS-15's. Those with a background appropriate for a rating of 16——

Mr. JACOBS. But you will take someone who knows about oil but apparently you won't take someone who knows about adjudicating disability claims on a State level. I find that puzzling.

Mr. DULLEA. I think we would. There is a standard in the announcement.

Mr. JACOBS. My friend tells me that indeed we can stipulate that there is something deep in the bowels of your announcement but it is indicated that it is what is up front that counts. Why is it so late in the announcements?

Mr. DULLEA. We delineate various illustrations of administration of law. It says here, page 8, the grant, denial, or recovery of money benefits upon a hearing required by law. If an attorney working for a State agency had that sort of a background and met the other criteria he would be found eligible.

Mr. **Jacobs.** So if you used Mr. Archer's scratcher, would you make that more prominent since you are having trouble recruiting?

Mr. **Dullea.** No, it is not trouble in recruitment. The difficulty comes in the locations offered to the eligibles. We certified to Social Security something like 118 names in the spring. They had a positive reception from 1975 but when the eligibles were advised of the particular locations I think 20 who otherwise had been receptive backed off.

Mr. **Jacobs.** That is still a recruiting problem.

Thank you.

Mr. **Burke.** Mr. Steiger.

Mr. **Steiger.** Thank you, Mr. Chairman. Is there a difference of opinion between Social Security Administration and Civil Service Commission as to who should be in charge of hearing examiners or ALJ's.

Mr. **Dullea.** It is not a difference of opinion. I think they are covered by the Administrative Procedure Act, certain sections of the law and by the Commission's regulations. It is not a matter of any difference between Mr. Cardwell, Mr. Trachtenberg, and the Civil Service. The law and regulations delineate that.

The Civil Service Commission has control of the classification of jobs. It has control of any removal action in the event action were taken against an administrative law judge. It would have to be on an open hearing before the Civil Service. These people are recruited, examined, and classified by the Civil Service Commission. Otherwise the employee, once appointed, is, for administrative purposes, household administration and payments, an employee of the Agency. I think we may say in a third concept he is independent with regard to hearing and decisional work.

Mr. **Steiger.** Would you change that system to allow the Social Security Administration to have more opportunity to direct and place those who are now under your jurisdiction?

Mr. **Dullea.** I wish you would define further the word "jurisdiction." Section 11 of the APA states that subject to the civil service laws there shall be appointed competent and able examiners in the agency. They shall not be assigned inconsistent duties. The Commission may borrow them from time to time. The Commission will classify the job and any cause for removal will be heard by Civil Service. That delineates our jurisdiction.

Mr. **Steiger.** As I recall the Commissioner's testimony the last time he appeared before the subcommittee, I believe he raised the issue. I think we have heard testimony indicating it is difficult for the Social Security Administration to have much—I don't want to use the word "control" because it is inappropriate—but you lack the authority to direct how much they will work, in effect.

Mr. **Cardwell.** Let me try to summarize what I think that question is. There is no difference over who has what jurisdiction over which stage of a matter, the recruitment and placement authority is clearly under law and regulation assigned to the Civil Service Commission. They have control over the basic question, for example, of what ALJ's per se would process title XVI cases. They made that decision.

Once they made the decision, it was binding on us. That decision is one on which there was a diffierence of opinion, I don't think really in spirit so much as a difference from our point of view concerning the practical effect of that decision.

The practical effect is such that we then have two separate corps of examiners, one who can hear only title XVI cases and one who can hear all kinds of cases.

The fact that we cannot move the title XVI officers in to hear other cases inhibits our flexibility.

It also, probably, in the Congress terms, makes for a less than fully efficient manpower development program. If you cannot aspire to a higher job, or more important job through your performance on your job, then one of the motivational forces that normally cause people to reach out is missing. It is the practical effect we are concerned about.

Mr. **Steiger**. Can the differentials be justified?

Mr. **Cardwell**. In my judgment, no. I think the title XVI process is equally as difficult as the title II process. But the Commission apparently, and Mr. Dullea should speak to this, was persuaded by their examination of the title XVI statute itself and what they believed it intended by way of difficulty and the role assigned.

Mr. **Steiger**. Do you want to comment on whatever justification there is for difference, Mr. Dullea.

Mr. **Dullea**. I would like to go back to the question you put to Mr. Cardwell. I understood it to be about the element of control. I think this is one of the things that concerned the Congress and that ultimately led to the enactment of the APA. As I read the legislative history it was to eliminate any possibility of mailing or improper influence by management on the independence of the hearing examiner. It was for that reason that the Congress provided certain responsibilities to the Civil Service Commission so management could not favor or disfavor some incumbent examiner because of a decision.

With respect to the grade differential, GS–13 and GS–15, I would like to go back to 1967. The hearing examiners in the Social Security Administration at that time was GS–14. The Commission made a very comprehensive analysis of the job requirements and determined then that it was classifiable at GS–15. There was much interest in that determination and I know it took a considerable period of time. Now those incumbents who were classified at GS–15 had a variety of responsibilities. In looking at the responsibilities, they had to make determinations under title II, traditional disability. They had to make determinations under the new amendment to the act dealing with provider of service cases which are adverserial, incidentally. Additionally, at the time, we were cognizant of the fact that the hearing examiner could be called upon for assignment to the Office of the Secretary for civil rights cases.

Additionally, as an APA's ALJ, he was and is frequently called upon by my office to conduct assignments in other agencies, a variety of work.

I have called on Bob Trachtenberg for his ALJ's to adjudicate cases in the Federal Reserve, Comptroller of the Currency, Home Loan Bank Board. So this combination and weight of responsibility moved the Commission in 1967 to come up with a GS–15 designation. The proposal made to the Commission when the SSI program came into existence, as I recall, GS–14, the agency itself. The Commission did not have direct authority to classify those positions, but the Commission had indicated that it wanted to make a postreview of what the agency were doing under the act. As a result we took a look at those jobs, not my office, but we determined that the work there was much more limited. That job merely required the incumbent to adjudicate cases under title XVI, blind, aged, and disabled.

Some of the work, if we break it down, was considered by the classifier, I recall, to be probably at a GS-11 level, some aspects of it. So ultimately the determination of the Commission was GS-13. But we advised the agency that we could see a proper basis for some additional positions if they wanted to create GS-14 supervisory hearing examiners.

The agency has never made any effort to make that application. So I hope what I have said has shown the heavyweight nature of the GS-15 ALJ, which is somewhat different than the level of the work performed at the 13 level.

Mr. Steiger. On page 14, Mr. Commissioner, you comment on the matter of an ALJ remanding cases. What work, Mr. Commissioner, is now going on? Is that prohibited by law at the present time or is it something that has never been done?

Mr. Cardwell. It is a matter of administrative practice and tradition. That very process is now being examined on a pilot basis.

Mr. Steiger. When can we expect to get some results from the process?

Mr. Trachtenberg. We just started with it in the last couple of months. We only have about 6,000 cases that have been remanded. It is not a wholesale remand. It is only remanded when there has been some change in the condition of the claimant from the time the reconsideration determination was made. For example, a hospital stay since then or something of the nature.

We are exploring a broader base of remand regulations. By the way these informal remand procedures will be codified within the next couple of months. Right now we are testing out the procedure to see how it is working. The broader remand would be a remand back to either the district office or to the regional commissioner in a given region or to the State agency involved with the medical issues.

Where a case has not been adequately developed, such as where consultation should have been obtained or vocational inputs were not obtained, there are some problems with remand. It slows down the process. It tends to affect the period of time that the claimant must wait for a decision. So there are problems with the remand procedure because it takes time to go back to the lower levels.

I am hopeful, however, that with a remand procedure, the State agencies at the lower levels will learn what good development of the case is and therefore be able to give a better developed case to the ALJ.

Mr. Steiger. I am perturbed that both you, Mr. Dulles, and you, Commissioner, say that one of the ways to deal with this backlog is to limit the time in which one can appeal. How would you justify reducing the amount of time in which an individual can decide whether to seek reconsideration?

Mr. Cardwell. I think it is a matter of weighing the value of maximum opportunity to avail one's self of a right, which is normal and customarly, against the cost of the whole appeals process. As I pointed out, in the 4 levels of appeal, 2 of them allow a 6-month time frame and 2 are at 60 days. On its face in that contrast 6 months seems to be an extraordinary bending-over-backwards on the part of the Government in order to help an individual decide whether to appeal a decision. I don't know what influences delays of decisions, I have no idea. Our theory was we were trying to even out that process. We do think it would have a net effect on the reduction in appeals. There is no question about it. As I pointed out, the individual would not be denied the right to reinitiate his case itself as a new claim. He would not be denied that right.

When you stand back and look at it, it is not an unfair decision. It is clearly the decision that would move you in the direction of a lessening of a right that now exists.

Mr. **Steiger.** You are not going to find a sympathetic ear with this one member. You are talking about people. They don't have lawyers, by and large. Many are older people. You would be saying, in effect, let's force them into a position where they have to go and get outside help.

Mr. **Cardwell.** Let's not paint it as darkly or harshly as that. It would smooth out an inconsistency in the law. The title XVI period is only 30 days and we will move that forward. We are not moving that forward nearly as much as we would be moving the other one back, but there is an illogical, inconsistent pattern at the moment. I personally think that the pattern does adversely affect the total cost.

Mr **Steiger.** I'm afraid what you are suggesting would adversely affect those who believe they have a problem and they would like somebody to take care of it.

Mr. **Burke.** In these cases in the other agencies, how much time do claimants have to apply for a hearing?

Mr. **Dullea.** I have some statistical evidence accumulated by the administrative conference about a year ago.

Mr. **Burke.** You can submit it for the record. Give us an analysis of the rights of claimants in the other agencies—what time periods they have to file for appeals.

Mr. **Dullea.** If I may respond to that, in a great number of agencies we are not dealing with individual claimants. As I indicated in an earlier question, most of the others are heavyweight, full-blown, adversarial-type proceedings like in the SEC, CAB, and Federal Trade Commission. The social security system almost fits that pattern in terms of it coming under the Administrative Procedure Act. There are similar programs in other agencies but they are not under APA. Within Civil Service we have a disability adjudication program which is not under APA and does not require administrative law judges. There is a disability program in the Railroad Retirement Board. They don't use administrative law judges. The Veterans' Administration is an excellent example. They don't do it under the APA, nor do they require administrative law judges.

Mr. **Trachtenberg.** This is very much near and dear to my heart as the Director of the Bureau. In the VA cases, for instance, these cases are not subject to court review whereas every case that our administrative law judges decide is subject to review by a U.S. district court. It is also very important not to feel that because we are not conducting an adversary proceeding that the protections of the APA should not apply. It is felt by many, and some whom I respect considerably as lawyers, that the procedures that the ALJ in social security goes through—being the judge, yet representing the claimant's interests when many times the claimant does not have a legal representative in the case, and there being no Government counsel—places a tremendous pressure on the need for quality judgment and great incisiveness both in the law and the ability to determine the material facts.

There is nothing in my view that says that an APA proceeding, for instance, necessarily must be an adversary procedure where you have the traditional legal counsel on one side representing the Government and counsel representing the other party.

This is a personal opinion, but the Congress might ask itself why these other disability programs are not under APA.

Mr. **Cardwell.** Mr. Steiger, could I come back to your concern? This is a proper one and one we wrestled with. If you look back at the history of the matter, it seems to us that the 6-month period really envisions a much simpler world, a world where the volume of cases would be relatively small and where everybody could be treated equally. I don't think under this arrangement you can treat everybody equally; in fact, we are not now treating everybody equally. So there is a trade-off to be considered.

I recognize, and I am sensitive to the fact, that it does on its face suggest a step backward. If you look back at the origin of the idea, it is based on a simpler world than we now have. The court step allows only 60 days. That should be viewed as the ultimate step, it seems to me.

Mr. **Burke.** How many law judges do you have now on disability?

Mr. **Trachtenberg.** 436.

Mr. **Cardwell.** Not all on disability.

Mr. **Burke.** I am talking about social security.

Mr. **Cardwell.** They all hear disability cases. Of course, there are some other kinds of cases within the program they hear, but 90 percent of the work is disability.

Mr. **Burke.** How many do you expect to add to that?

Mr. **Cardwell.** Hopefully another 55.

Mr. **Burke.** If they hear the amount of cases that you have set the goal for them, 300 a year, how many judges do you believe are needed?

Mr. **Cardwell.** In order to get control of the backlog within the period we are talking about, which is really basically a year from now, we would need another 200 presiding officers. We have——

Mr. **Burke.** 145 more than you are getting.

Mr. **Cardwell.** Yes; but we have people on board who, with some training, have the capability of doing this. We have 125 SSI hearing examiners who are developing experience in title XVI disability issues which as you know, Mr. Chairman, are not that dissimilar from the title II disability issues. We have 95 black lung temporary administrative law judges who upon the conclusion of the black lung program hearings load will be available to the title II backlog.

Mr. **Burke.** How long will it be before you get to them?

Mr. **Cardwell.** My goal is to conclude the hearings involvement in the black lung program in March 1976. We have 17,000 cases left.

Mr. **Burke.** That doesn't speed up the caseload very much. You are still going to have quite a backlog at the end of 1976.

Mr. **Cardwell.** We will have, if there is not some way to obtain flexibility to use the 125 SSI hearing examiners and the black lung judges when they have completed that program. We can be somewhere around 80,000 cases, as opposed to some 100,000 now, by June of 1976.

Mr. Burke. What happens when the claimant has finally exhausted his appeals and he is at his last step and he dies as a result of his disability?

Mr. Gonya. The estate can file action in the U.S. district court on his behalf.

Mr. Waggonner. The estate must file civil action.

Mr. Gonya. If the administrative remedies have been exhausted, then it is ripe to go into the U.S. district court.

Mr. Waggonner. What if the administrative remedies have not been exhausted?

You have a 60-day period before the social security appeals council and that has not been used.

Mr. Gonya. Then the estate can pursue it within the administrative framework.

Mr. Waggonner. What is the framework?

Mr. Cardwell. Pick up the case where it happens to lie at that point in time.

Mr. Burke. Do you usually make a favorable ruling on behalf of the claimant after he passes away? In other words, he died to prove he was totally disabled.

Mr. Cardwell. That is the cruelest kind of case.

Mr. Burke. I have had some of those cases over the years.

Mr. Trachtenberg. We have had too many of those.

Mr. Burke. I have had people in to see me during my trips to local post offices who were concerned over some of their relatives who had appealed and they finally left the world and that was the end of it.

Mr. Cardwell. If a person were to die while the process is still underway, his heirs almost always feel he was disabled and thus proved it. It is not a good situation to ever allow to happen.

Mr. Burke. That is one of the things that concerns me about the delay in many of the hearings, many of the claimants do pass away. It seems to be a harsh and cruel method. I think we ought to bend every effort toward hiring all the law judges that we need and not procrastinate. I think we ought to bite the bullet and face it.

You are talking about some additional law judges here. If you take on 150 more law judges, I do not think it is going to break the budget. It will help to take care of all these cases that certainly should be looked at.

Mr. Pickle.

Mr. Pickle. Thank you, Mr. Chairman.

Mr. Commissioner, we have 16,314 cases pending under SSI and disability and 17,041 pending under SSI. Now you tell us that you hope to take care of this load by the fact the black lung claims will phase out soon. But isn't the extra load that is coming to you by virtue of the increased claims that are on appeal under SSI going to more than offset any kind of slack you have had? Isn't it going to make it more difficult?

Mr. Cardwell. Yes, sir. Let's try the arithmetic like this: Finishing the black lung caseload, which is a larger caseload than the expected SSI caseload, will produce a net gain but not a sufficient net gain to reach the goal. The goal can only be reached if in addition to finishing the black lung caseload we also increase our productivity and enlarge the whole scope of the activity.

Mr. **Pickle.** You say the way you are going to cure it is to increase productivity of the hearing officers and initiate some changes designed to reduce the number of hearing requests. This brings to my mind some questions along the lines Mr. Steiger asked about. Can you shorten the time to 60, 60, 60, 60, and still protect the rights of the individual under the APA or whatever procedure that must be followed to be certain that his rights are protected?

Mr. **Cardwell.** It is not inconsistent with APA. You are affording the individual less protection than he would receive under existing law.

I don't think that can be denied. The question is, is it still a fair measure of protection and in our opinion it would be.

In the case of title XVI it goes beyond the present levels.

Mr. **Pickle.** I wonder why you waited for years before you recommended cutting down from 6 months to 60 days.

Mr. **Trachtenberg.** I think part of it is a different world we are dealing with as the Commissioner said. When the 6 months period was established, we were not talking in terms of annual receipts of 140,000 hearing requests. We were talking about something in the neighborhood of 30,000 or 20,000 requests a year. I do not think it will hurt the claimant, because if he has new information, new evidence, he can file again. In fact, he is getting a second bite at the apple. There are rules wherein his first application could be reopened within a given period of time once he refiles.

Mr. **Pickle.** Perhaps you have been too slow in coming back and making this change. This does not come as a surprise to you where you must decide this is a new world. But you say you can cut your time and still protect the rights of individuals.

Now the appeal process that you have, you go through basically five different steps from the time he files. Are you cutting out any of the steps of appeal?

Mr. **Trachtenberg.** No, not by the recommendation to reduce the appeals period.

Mr. **Pickle.** You do not think there is a need to cut out any of the two final appeals? You keep the same basic five steps from initial claim. Could you save a time segment if you cut out one of the appeal steps?

Mr. **Cardwell.** Yes, you could.

Mr. **Pickle.** Have you thought about that?

Mr. **Cardwell.** Yes, sir.

Mr. **Pickle.** You recommend against it?

Mr. **Cardwell.** Yes, sir.

Mr. **Pickle.** I am not sure I understand the controversy that is brewing over the administrative law judge and the hearing examiners. You have some 436 administrative law judges. You only have 43 added this last year. You asked for 75, correct?

Mr. **Trachtenberg.** Altogether it was 62 during the first half of 1975.

Mr. **Pickle.** You are going to need more. What are you doing to get them? Will it be a problem to get them?

Mr. **Trachtenberg.** The problem really stems, when you look at the entire number of requests for hearings from a very large portion that is now SSI. We have the 125 SSI hearing examiners. The problem is they can only hear about half of the SSI workload.

They are the SSI only cases. What has been happening is that our receipts over the last few months are showing that about 60 percent of the requests for hearing coming in are SSI and title II concurrent cases. The SSI hearing examiner cannot hear that concurrent case because the title II aspect of it is under the Administrative Procedure Act and he is not APA qualified. So I have this body of 125 people who can only deal with half the workload we are faced with now. That is a fundamental problem.

Mr. **Pickle**. Do you want to liberalize it so that the SSI and disabilities can be heard by hearing examiners?

Mr. **Trachtenberg**. That is my view of what is necessary in order to meet the reduction of a backlog.

Mr. **Cardwell**. At least as a temporary measure, not necessarily as a permanent one.

Mr. **Steiger**. Would you have to change the statute to accomplish that?

Mr. **Cardwell**. They have interpreted the statutes that govern their actions.

Mr. **Steiger**. But you would want to overturn that. We would have to do that in order to undo what Civil Service did in interpreting what we did in the first instance.

Mr. **Cardwell**. Let me set this out for the record which has not ever been established before. The executive branch in concert has not come fully to grips with this question. You are debating it as we are debating it. It may well be when we finish our debate which would include considerations and input by the Administrative Conference of the United States that we could decide it did not require legislative change or we might even decide that the Social Security Administration's position is the wrong position.

So I would really like to have a later chance to put in your record the input of these other people. The Civil Service Commission certainly has to have a voice. The OMB also wants a voice.

Mr. **Burke**. What is the Civil Service position here? Here you have 107,000 people with a backlog of cases running up to 18 months and we are bickering over the appointment of 150 more judges. You are getting down to nitty-gritty questions of whether or not the fellow sitting in on the SSI case is competent to sit in on a total disability case. They are kicking this back and forth and in the meantime you have 107,000 human beings out in America waiting for their cases to be decided.

What kind of bureaucratic talk is that? I think you have to make a decision and get these cases cleaned up. If the law is preventing it, let's find out and we will put a law through in 24 hours. If it is a regulation and a clash of personalities in different bureaus, let's find out.

We are dealing with human beings here. You have 107,000 cases here and here we are listening to a lot of talk about whether Civil Service should do this or whether Social Security should do this and the need for additional judges to handle these cases. You are talking about a $5 million appropriation a year. That is not going to break the budget. They spend that much in 5 minutes down at the Pentagon. We've had enough of these bureaucratic decisions. Somebody has to do something here. You have the people of this country up in arms. I recently made a trip around my district and half the people who talked to me were concerned with disability appeals they had pending. I had one woman brought up in a wheelchair for me to look at. I talked to the Commission and they said they are doing what they can. I can see here that you are talking about appointing 55 additional law judges here when you should be appointing about 200 or 250.

You are getting into a discussion back and forth on whether civil service should make this regulation or make that regulation. We need these cases heard. It is up to you two gentlemen to get together and get it done.

Mr. PICKLE. As I understand it, you do recommend that SSI and disability cases be heard by examiners as well as ALJ's?

Mr. CARDWELL. That has been our position from the very first day and is still our position.

Mr. PICKLE. If I understood correctly, you said you think that should be done and you think you have the authority to do it. Are you going to give us a definite statement on it?

Mr. CARDWELL. No, sir, I know beyond question that the Social Security Administration lacks the authority to do it unilaterally. To do so we would be violating a directive given to us by higher authority.

Mr. PICKLE. Then you need a change in the law to make this possible?

Mr. CARDWELL. Or else the higher authority has to reconsider its position.

Mr. PICKLE. Where else could the authority come from, civil service?

Mr. CARDWELL. Yes, sir, I assume they believe their position to be consistent with the law as they interpret it.

Mr. PICKLE. In order for us to have a clear picture on this, I ask that you give us a statement jointly or individually with your specific recommendation as to what needs to be done—what legislation, is required for a change or if you can do it within your own regulations—and to do it within the next fortnight. Is there any reason that cannot be done?

Mr. CARDWELL. I would suggest that we try to do it jointly. We are not really opposed to each other. There is no real controversy. There seems to be an impediment as we view it.

Mr. Dullea should speak to it.

Mr. PICKLE. When can you get together and give us a report?

Mr. DULLEA. I would like to address one thing that you raised. It is not a matter of regulation. The SSI title XVI was enacted here 2 or 3 years ago. It had very precise and specific language that the Secretary of HEW would appoint hearing examiners without meeting the standards of the APA. That language is very clear on its face. The Civil Service Commission with the advice of the Justice Department was handcuffed.

Mr. STEIGER. Can you cite that for us?

Mr. BURKE. If the law has to be changed, we would like you to come in with a recommendation as to what has to be done so we can get additional judges hearing those cases.

We cannot sit here and allow that condition to exist. Every Congressman on the floor asks me daily what we are doing about this.

Many Members of Congress have filed bills on this. Congressman Karth had to go back to his home district today and he has quite a bit of evidence to submit for the record.

We are dealing with human beings here and we have to get some constructive answers from you, Mr. Dullea and Commissioner Cardwell, on what can be done to get these cases heard and expedited so the people can have their day in court. You are not coming up with any answers so far. I am not being too critical of you but I think you are bogged down with a lot of bureaucratic decisions that could be straightened out by regulation. If they cannot be straightened out by regulation, if the law has to be changed, you tell us where the law conflicts with having this done.

Mr. TRACHTENBERG. Mr. Chairman, if I may put one thing in perspective, that is that the decision on whether title XVI is or is not under APA is a contributing factor, but the backlog has been caused by many factors, not just the civil service issue. I think that is important to understand.

Mr. CARDWELL. It would be remiss of us to allow the impression to stand that this is the cause of the problem. It is one of the remedies, however.

Mr. PICKLE. You ought to clear it up for us and say what portion of the problem it is related to.

Mr. TRACHTENBERG. It is expedient to dealing with the problem.

Mr. PICKLE. One of our colleagues, Mr. Sisk, has introduced H.R. 8018, which would require the right of face-to-face informal conferences and a written explanation. Have you already recommended that be done in your face-to-face procedure?

Mr. CARDWELL. We have not come to that conclusion in a full and final way. We are certainly moving in that direction.

Mr. PICKLE. Isn't what you recommended in effect that very procedure?

Mr. CARDWELL. It is one of the things we think we should do. We think we can do it under existing law.

Mr. PICKLE. Thank you.

Mr. BURKE. Mr. Jones, I want to thank you for your patience. Under the Gibbons rules you would have been recognized first but Mr. Gibbons is not on this committee.

Mr. JONES. Thank you.

I want to reiterate what has been said about the problem which appears to be a simple bureaucratic mixup on the use of hearing examiners. You are recommending that hearing examiners be allowed to hear social security and SSI disability cases but in the next breath you are saying they ought to be kept separate as far as their civil service ratings, is that accurate?

Mr. CARDWELL. When you point to me and make the statement, I think that is inaccurate. When you point to both of us, I think it is accurate. Upon the enactment of title XVI, the Social Security Administration and Department of HEW took a very strong position that the administrative law judge corps should be used to process title XVI SSI claims. The Civil Service Commission and the Department of Justice came to the conclusion that that would be an improper utilization of the Administrative Procedure Act.

Mr. **Jones.** What is the biggest problem in your backlog, SSI or the other?

Mr. **Cardwell.** No, SSI is not the biggest problem in the backlog.

Mr. **Jones.** In your recommendations of how to change the law and let these hearings examiners help the ALJ's, why don't you also give us some recommendations that you would approve having these hearings examiners move right into ALJ status so that we can get rid of this backlog since these 124 people have a good deal of experience and if the SSI backlog is not the problem, you can bring some new temporary people on to handle the SSI backlog.

Mr. **Trachtenberg.** One of the problems, Mr. Jones, is the fact that the hearing examiners, many of them, do not have the requisite years of experience necessary to meet the requirements of the 318 application form of the Civil Service Commission.

Mr. **Jones.** But they would be doing virtually the same work.

Mr. **Trachtenberg.** That is correct.

Mr. **Jones.** I don't understand that it is the distinction without a different situation, except the ALJ lobby doesn't want the GS-13 to be equal with them.

Mr. **Cardwell.** Mr. Dullea pointed out in his testimony that the higher grade ALJ is required to perform other assignments which would go beyond those in the Social Security Administration and imply a greater complexity and need for experience and capacity

Mr. **Burke.** Would you yield?

Mr. **Jones.** Yes.

Mr. **Burke.** These hearing examiners who have been hearing the SSI cases which are very similar, why aren't they qualified to sit on the other cases?

Mr. **Dullea.** The impediment in the law.

Mr. **Burke.** Because the law says 5 years.

Mr. **Dullea.** The law says nothing with regard to the standard for any class of administrative law judges. In enacting title XVI in 1971 and 1972 the law contained a provision, I think it was section 1631, which said the Secretary would appoint the hearing examiners without meeting the specific standards for hearing examiners in the Administrative Procedure Act. So the Commission in light of that language would not furnish administrative law judges.

That language was explained in the legislative history. I cite from House Report 92-231. It says, "Therefore, under your committee's bill the Secretary would establish the requirements to be used in selecting examiners." The examiners, paraphrasing now, would not be selected under the conditions set forth in the Administrative Procedure Act. Now the Commission and the Department of Justice regarded the legislation and its history to create a new class of hearing examiners. Our hands were tied. The fault we find with 8911, I believe, is a provision that is not consistent with the Administrative Procedure Act.

Mr. **Burke.** That is all well and good about what has been done in the past. What we are talking about is the immediate problem. What do we do to get these 107,000 cases handled? Do we have to change the law and if we have to change the law, we want you to come in with a suggested draft to change the law so we can expedite these cases.

The American people are not going to sit back and give a lot of gobbledygook about why they cannot hear these cases. There are 107,000 people out there with an appeal before a Government agency and they expect to be heard. We cannot have them passing away and leaving this world and not having their cases handled, as has happened.

Mr. JONES. Mr. Chairman, this sounds like so much mumbo-jumbo. Maybe we ought to take the record and send it into the local newspaper that has a prize for the greatest gobbledygook of the day.

We have a quorum call here but let me reemphasize. I think every member of the subcommittee has been where the people are and has been getting the heat.

The people want some attention given to this. We cannot see the distinction that you are drawing, I can't, anyway. It seems to me that if the bureaucracy cannot straighten it out then we need to know how the law needs to be changed. You made the statement that to upgrade these hearing examiners I believe you said would be corrupting something.

Mr. CARDWELL. I don't believe that it would. I said there are those who hold that view. I don't hold that view.

Mr. JONES. It seems to me the only thing that might be corrupting is the present law. That is what we are here to try to change.

Mr. CARDWELL. Could I help sharpen the issue in deference to Mr. Dullea? If you asked the Civil Service Commission one question, would you oppose a change in the provision that they have interpreted to prevent the use of ALJ's in the title XVI process, a yes or no answer to that question should clear up that matter.

Mr. BURKE. Before we ask that question, we have a quorum call now and in fairness to both of you we will adjourn now and ask you two gentlemen to come back after we complete the hearings. We assume both of you will get together and sit down in a cooperative way and coordinate your problems and see if you can come up with an answer.

The U.S. Congress is confronted with this problem. We don't want any procrastination. We are not interested in any fight between two different groups in the agencies or their grades. We want to get these cases heard and expedited.

Mr. STEIGER. Before you adjourn, this one member would encourage you to send a letter to the Chairman of the Civil Service Commission and ask the question the Commissioner suggested be asked. That is simple enough to do.

Mr. BURKE. He can answer it now if he wants.

Our time is running out.

Mr. DULLEA. I am not in any position to answer it.

Mr. STEIGER. I think we ought to ask him in writing.

Mr. BURKE. We are going to keep the record open at this place and we are going to submit questions to both of you in writing and hope you will have the answers for us before you come back.

My recommendation is that you sit down and get together and straighten out this problem.

Mr. CARDWELL. I will have Mr. Dullea buy me lunch.

[The following information was subsequently supplied:]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
Baltimore, Md., October 10, 1975.

Hon. JAMES A. BURKE,
House of Representatives,
Washington, D.C.

DEAR MR. BURKE: I am forwarding to your request of September 23, 1975, the responses to all but two of the Subcommittee's questions. The responses concerning our position on H.R. 8911 and H.R. 8018 require Office of Management and Budget clearance. They will be furnished shortly under separate cover.

In addition, I will be pleased to appear at the hearing scheduled for the afternoon of October 20.

Sincerely yours,

JAMES B. CARDWELL,
Commissioner of Social Security.

Enclosure.

1. BREAKDOWN OF PERSONNEL NEEDS

You state on page 11 of your testimony that the Bureau of Hearings and Appeals will require 4,000 man-years of activity annually. How many of these man-years will involve hearing officers? Do these include the 200 new hearing officers you referred to in your testimony? For the record, could you give a breakdown of these requirements in some detail?

The tentative budget for the Bureau of Hearings and Appeals for FY 1976 is 4,450 man-years which is broken out as follows:

Hearing offices:	
Hearing officers[1]	675
Staff attorneys	325
Support staff	1, 600
Development center	220
Appeals operations[2]	1, 200
Staff activities:[3]	
Regional office	155
Central office	275
Total	4,450

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[1] Includes the 200 judges referred to in my testimony, some of which would be former temporary black lung administrative law judges and hearing examiners SSI.

[2] Represents central office activities in direct support of appeals function.

[3] Represents central and regional office activities which indirectly support the hearings and appeals function.

2. POSITION ON HR 8911

What is your position on section 3 of HR 8911 which has been reported out of the Subcommittee on Public Assistance?

The departmental report follows:

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
November 18, 1975.

Hon. AL ULLMAN,
Chairman, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request for the Department's views on H.R. 8911 and H.R. 8912, two bills amending title XVI of the Social Security Act which have been reported to your Committee by the Subcommittee on Public Assistance.

H.R. 8911 contains a number of provisions for changes in the supplemental security income (SSI) program designed to improve equality, correct anomalies, and resolve administrative problems that have affected the program during the initial operating period.

Under the existing concept of the SSI program as one intended to adjust an individual's benefit according to his circumstances and on the theory that his needs are affected by his circumstances, we could support a number of the provisions contained in this bill. As presently constituted, the statute does in certain cases result in unequal or arbitrary treatment of aged, blind, and disabled individuals.

Examined from a different perspective, with administrative feasibility in mind, these same provisions take on a different light. In short, we are concerned that the more the statute is modified in pursuit of more extensive means testing—even in the name of equity—the more difficult the program will be to administer from the Federal level and, thus, the less the likelihood that the program will serve the majority of its claimants and beneficiaries either equitably or efficiently. In other words, addition of provisions for the purpose of refining the system's means testing devices will, in our judgment, make the program more complex and more difficult to administer uniformly and/or efficiently.

Thus, we would suggest that H.R. 8911 be reconsidered with this concern in mind. To this end, there are several provisions in the bill which would, in our judgment, facilitate administration and contribute to overall efficiency. We would give first priority to these particular amendments.

For the convenience of the Committee, we have organized our comments on the two bills as follows:

1. Comments on those provisions of H.R. 8911 that would, in our judgment, improve administrative and operational efficiency without undue program complexity.
2. Comments on those provisions of H.R. 8911 and H.R. 8912 that would run the risk of adding to administrative complexity.

Within the second category, we have divided our comments into those provisions that we find supportable under existing SSI program principles—with only secondary consideration to complexity and administrative capacity—and those provisions that we believe to be faulty on their merits.

Provisions which we find particularly objectionable are section 10 of H.R. 8911, and H.R. 8912. Section 10 of H.R. 8911 would provide for a mandatory "pass-through" by States of Federal SSI increases with Federal fiscal protection against the increased State costs of such a requirement provided to six States (known as the "hold harmless" States). H.R. 8912 would provide for individual variations in the Federal benefit levels for recipients on the basis of their housing costs. These two provisions would cause an excessive increase in Federal costs: $155 million for the mandatory "pass-through" and $825 million for the housing variations under H.R. 8912. Moreover, both of these provisions violate the basic premise of the SSI program—that the Federal Government should provide a minimum benefit to all aged, blind, and disabled persons, leaving to the States the option of supplementing the basic Federal benefit to the extent they deem necessary in light of the needs of their residents.

Section 20 of the bill is still under consideration. It would provide for the exclusion from an individual's income of assistance payments made under section 8 of the United States Housing Act of 1937 with respect to the dwelling unit leased for occupancy by the individual. The section presents a problem typical of the interface problems that inevitably arise with the confusing tangle of categorical public assistance programs that exist today. These problems will never be finally resolved until these programs are reorganized into a more rational form.

Briefly, our views on the various provisions of H.R. 8911 and H.R. 8912 are as follows:

PROVISIONS OF H.R. 8911 WHICH THE DEPARTMENT RECOMMENDS AS HAVING A POSITIVE EFFECT ON ADMINISTRATIVE EFFICIENCY

Section 3: SSI Hearing Examiners—We would revise section 3 of the bill so that it merely amended section 1631(d)(2) of the Social Security Act, which now provides for the appointment of special hearing examiners to hear cases under title XVI of the Act. The amendment would add to the end of section 1631 (d)(2) the following sentence: "To the extent that the Secretary finds that it will promote the objectives of title II, in the case of any claimant under this title who is also claiming benefits under title II, the Secretary may provide for a hearing examiner appointed under this paragraph to conduct a hearing under title II with respect to any matter arising in the course of a hearing held prior to January 1, 1979, under this title that may be subject to a hearing under title II with respect to that claimant."

The effect of this amendment would be to permit title XVI hearing examiners to hear what are known as "concurrent" title II cases, *i.e.*, a title II case involving a title XVI claimant, where the issue to be heard pertains to the claimant's entitlement to benefits under both titles.

Section 4: Attribution of Parents' Income and Resources to Children—Under this provision, an eligible individual living with his or her parents would be subject, upon attaining the age of 18, to the one-third reduction in his or her benefits which applies to all adults living in the household of another. Under present law, the income and resources of recipients who are students aged 18 through 20 are deemed to include the income and resources of any parents with whom they live, while the one-third reduction rule applies to nonstudents who are over 17. The Department recommends favorable consideration of this provision, since it would remove the disparities that exist under present law in the treatment of students and nonstudents aged 18 through 20. The implementation of this provision would result in negligible additional costs. This provision is similar to a provision in the Administration's draft bill submitted to the Congress on July 2, 1975.

Section 7: Modification of Requirement for Third-Party Payee—Section 7 would authorize the Secretary to pay SSI benefits directly to a disabled individual who is a drug addict or alcoholic, if he determines, upon the certification of the chief medical officer of the facility where such individual is undergoing the treatment required by title XVI, that direct payment would be of significant therapeutic value. Under present law, SSI benefits to such individuals must be paid to a third party concerned and with their welfare. The Department supports this provision, which has no additional cost implication.

Section 9: Exclusion of Certain Gifts and Inheritances from Income—Section 9 would prevent the disqualification for or reduction of SSI benefits of an individual receiving gifts or inheritances not readily convertible into cash. Under this provision, gifts or inheritances not readily convertible to cash would not be regarded as income, but as resources. Under present law, the recipient would be allowed a period of time within which to dispose of the resources without such resources precluding eligibility for SSI benefits. After disposing of the resources the recipient would be required to repay the Secretary any amount to which he would not have been entitled had he converted the gifts or inheritance to cash immediately upon receipt. The Department supports this provision, the Federal cost of which would be negligible, because it does not seem equitable to regard as income that which cannot serve as income to the recipient. This provision is identical with one included in the Administration's draft bill submitted to the Congress on July 2, 1975.

Section 12: Increased Payments for Presumptively Eligible Individuals—This section would increase the amount of a cash advance payable to a presumptively eligible applicant who faces a financial emergency from $100 (the level of such an advance payable under present law) to the aggregate amount of the benefits for which the applicant is presumptively eligible during the first three months of presumptive eligibility. This section also would provide that the three-month limitation on the period of presumptive eligibility against which cash advances may be made, as well as the three-month limitation on the payment of benefits to presumptively blind and disabled individuals, would be waived during the first year following enactment of this section.

While the Department supports the increase in the amount that can be paid to a presumptively eligible person (which would cause a negligible increase in Federal costs), we would prefer that the provision be amended to limit to two months rather than three the period of presumptive eligibility against which cash advances may be made, and that no one-year waiver of this limitation or of the limitation on payments to presumptively disabled persons be enacted.

Section 15: Termination of Mandatory Minimum State Supplementation in Certain Cases.—This section would alter the degree of protection of benefit levels afforded certain "grandfathered" individual (*i.e.*, those SSI recipients who were receiving assistance under the former Federal/State matching programs for the aged, blind, and disabled). Under present law, States are required, as a condition of participation in the Medicaid program, to guarantee such individuals that their incomes under the SSI program will not be lower than their benefit level under the former programs. This section generally would relieve the States of the requirement that they reinstate mandatory supplementary payments that have lapsed for a variety of reasons; no reduction of an individual's payment would occur as a result of the provision.

The Department supports this provision because it will help to eliminate the inequities involved whenever special treatment is afforded one group of beneficiaries. This provision would cause no increase in Federal cost.

Section 16: Monthly Computation Period for Determination of Supplemental Security Income Benefits.—This section would change the period over which an individual's eligibility for SSI benefits is computed from a calendar quarter to a month. This section would cause no significant increase in Federal costs and is supported by the Department because it would allow some simplification in the administrative operation of the SSI program.

Section 18: Eligibility of Individuals in Certain Medical Institution.—This provision would amend the provision in present law under which an SSI recipient's monthly benefit standard is reduced to $25 for any month during all of which he is in a medical facility receiving Medicaid payments with respect to such individual. Section 18 would provide that the reduction in the monthly benefit standard to $25 would not occur until the fourth full month during which the recipient is in a medical facility receiving benefits on his behalf.

The Department supports this provision, which would cause an increase in Federal costs of $7.5 million, because it would take into account the need of individuals receiving short-term medical care to maintain a household to which they can return at the conclusion of their stay in the medical facility.

PROVISIONS OF H.R. 8911 THAT ARE CONSISTENT WITH EXISTING PROGRAM PRINCIPLES WHICH RUN THE RISK OF ADDING TO ADMINISTRATIVE COMPLEXITY

Section 2: Authorization of Initial Payments to Presumptively Blind Individuals.—This provision would authorize the payment of SSI benefits for up to three months to presumptively blind applicants. Current law authorizes such payments only to presumptively disabled applicants. The cost of this provision is an estimated $2 million in the first year following enactment. This provision would be advantageous to blind applicants. This provision is identical to a provision in the Administration's draft bill submitted to the Congress on July 2, 1975.

Section 5: Referral of Disabled Individuals Under 13 for Appropriate Health Services.—Under the terms of section 5, the Secretary would be required to refer all disabled and blind SSI recipients under age 13 to the appropriate State agency administering or participating in the State plan for maternal and child health services and services for crippled children approved under title V of the Social Security Act. The Secretary would be further authorized to reimburse such State agencies for fifty percent of the cost of any services provided to referred individuals. This provision would help children receive services they might otherwise not obtain, although we shall continue to explore the feasibility of referring these individuals to the State Medicaid agency. The first-year implementation costs of this provision, assuming all SSI recipients referred to the State title V agency receive services, could be as much as $43 million.

Section 8: Continuation of Benefits for Individuals Hospitalized Outside the United States in Certain Cases—This section would authorize the continuation of the payment of SSI benefits to an individual hospitalized outside the United States if the hospital providing services is closer to his residence than the nearest hospital in the United States, or if he requires emergency services, the need for which arises in the United States, or while travelling between Alaska and any one of the States and the nearest hospital is outside the United States. Under current law, benefits to such an individual would be discontinued if he were outside the United States for more than thirty days. This provision would result in a negligible increase in program costs.

Section 13: Emergency Replacement of Benefit Payments.—This provision would authorize the Secretary, with the approval of the SSI recipient, to withhold benefits due him and pay them to a State which, under an agreement with the Secretary, has provided emergency assistance to the recipient because his SSI check was lost, stolen, undelivered, or issued in less than the correct amount. This provision would cause no increased Federal costs.

Section 19: Exclusion from Income of Certain Assistance Based on Need.—This section would provide for the exclusion from an individual's income of assistance based on need provided by certain tax-exempt, private nonprofit entities. This provision would remove the disincentive in present law to such private organizations to provide assistance to SSI recipients and would cause only a negligible increase in Federal cost.

PROVISIONS OF H.R. 8911 AND 8912 WHICH THE DEPARTMENT FIRMLY OPPOSES

Section 6: Outreach Program—Section 6 would require the Secretary to carry out a program designed to assure that all persons eligible for SSI benefits are aware of the availability of these benefits and the procedures which must be followed to obtain them. No later than six months after the enactment of this section, the Secretary would be required to report to the President and to the Congress on the progress of the program and to offer recommendations for its improvement. This provision, which entails little or no additional cost, is opposed by the Department because it unnecessarily assigns to the Secretary a responsibility which is implicit in current law and which has been and will continue to be fully implemented. It should be noted that the Social Security Administration is engaged in several special outreach projects which extend far beyond any general public information effort.

Section 10: Pass-Through of SSI Benefit Increases—According to the terms of this section, all States providing supplementary payments to SSI benefits would be required, as a condition for participation in the Medicaid program, to "pass-through any increases in the Federal benefit level to recipients. Furthermore, this provision would afford full Federal fiscal protection to the six "hold harmless" States (California, New York, Massachusetts, Wisconsin, Hawaii, and Nevada). If no Federal fiscal protection were provided for these States, the cost to them of the mandatory pass-through would total approximately $155 million. However, under section 10, the Federal Government would pay this amount on behalf of these six States, while all other States would not have the option of gaining $65 million in savings due to the mandatory pass-through. (Actually, twenty-six States, including four of the "hold harmless" States, have already acted to pass-through at least part of the 1975 cost-of-living increase, so that recipients in those States are already enjoying at least part of its benefits.)

Once again, the purpose of the SSI program was to relieve the States of the task of providing an income floor—a task which the Federal Government can best perform—and to leave to them the role of providing for cost-of-living differentials by supplementing the Federal benefits as they see fit. To quote from your Committee's report on H.R. 1, the SSI program, as originally designed, "leaves each State completely free either to provide no supplementation of Federal assistance payments or to supplement those payments to whatever extent it finds appropriate in view of the needs and resources of its citizens. Each State would also retain complete freedom to revise at any time its determination of whether and to what extent it would supplement the Federal payments." (House Report No. 92–231, p. 19[illegible] Section 10 destroys this freedom of the States by mandating that their supplementation levels reflect the Federal cost-of-living increase.

Section 10 goes against the Committee's original purpose in establishing the SSI program in another way as well. It was the Committee's original intent that "increased costs (to the 'hold harmless' States) arising from changes in the State program . . . would . . . be chargeable to the State." (House Report No. 92–231, p. 201) We deplore this attempt to distort the purpose of the SSI program in an effort to prevent a few States from incurring the costs of providing for the needs of their residents—costs which must be incurred by all other States. Accordingly, we urge the Committee to delete this provision from the bill.

Section 11: Extension of Supplemental Security Income Benefit Program to Puerto Rico, Guam, and Virgin Islands—Presently these three areas operate Federal/State matching programs comparable to those which were in effect in all States prior to implementation of the SSI program. Section 11 would extend the SSI program to these areas and provide further that SSI benefit rates and other dollar amounts in such jurisdictions bear the same ratio to the benefit rates and dollar amounts in title XVI as the per capita income in each jurisdiction bears to the per capital income of the State with the lowest per capita income.

The Department opposes this provision, and recommends its deletion, for several reasons. First, the extension of the SSI program would have potentially disruptive social effects to these territories by adding a substantial number of new beneficiaries (approximately 150,000) to the welfare rolls. While they are eligible for financial assistance through other Federal programs (such as AFDC, adult assistance, or Medicaid), there is a fixed ceiling on the Federal share of such assistance which limits the number of recipients of assistance, but the SSI program, as extended to these territories under this section, would be open-ended and no such limit on the number of recipients would exist. Lastly, the Federal cost of this provision would be greater than our present budget constraints will allow ($125.5 million in the first year following enactment).

Section 14: Valuation of Individual's Home for Purposes of Resources Test.—This section would provide that an individual's home, regardless of its value, be excluded from the determination of his resources. Under present law, the Secretary must set a limit on the value of the home to be excluded as a resource.

The Department opposes this provision, which would result in a negligible increase in Federal cost, because we feel that, in order to protect the integrity of the SSI program, a reasonable limit on the value of a home excludable from resources should be set. We are curently reviewing the limits set in the Department's regulations to determine their appropriateness in light of present economic conditions.

Section 17: Support and Maintenance Provided in Another Person's Household.—Under present law support and maintenance provided to an individual is regarded as unearned income and can, as such, cause a reduction in an individual's SSI benefit. However, to simplify the process of calculating the value of support and maintenance in the case of individuals living in the household of another, present law provides for a one-third reduction in the benefits of such persons. Section 17 would lower the amount of this reduction from 33-1/3 percent to 20 percent.

The Department is opposed to this provision, and recommends its deletion from the bill, not only because of its high Federal cost ($100 million in the first year following enactment), but also because we believe that the value of support and maintenance provided to persons living in the household of another in most cases exceeds $52.56 per month (the maximum value of the one-third reduction). Such persons, we believe, therefore, already enjoy a special advantage over other SSI recipients with other living arrangements who do not receive in-kind support and maintenance.

Section 21: Disregard of Supplemental Security Income Benefit Increases in Determining Certain Housing Benefits.—This section would provide for the disregard of any cost-of-living increases in SSI benefit levels for the purposes of determining eligibility and the amount of rental payment under any Federal or federally assisted rental housing program.

This provision could cause an increase in Federal costs for the public housing program alone of $16.6 million in the first year following enactment and $30 million in the fifth year following enactment. Cumulative public housing costs over the five-year period 1976–1980, measured in terms of lost rents, may have to be made up in increased Federal subsidies which would aggregate about $120 million.

This Department, as well as the Department of Housing and Urban Development, is opposed to this provision. We believe that it is illogical to grant cost-of-living increases in SSI benefits while at the same time precluding increases in rents for which the cost-of-living increases were intended to compensate. Moreover, this provision is inequitable in that it would grant special anti-inflation protection to a special class of tenants and prospective tenants of federally assisted housing solely on the basis of the source of their income and it would discriminate not only against SSI recipients not residing in federally assisted housing (who would not receive protection against increased rental costs), but also against other tenants of federally assisted housing who do not receive SSI benefits.

H.R. 8912

This bill would provide for the Federal supplementation of an individual's SSI benefit by an amount equal to the difference between his housing costs (including rent, mortgage payments, real estate taxes, and fuel costs) and one-third of his income. Such supplement would not exceed $50 per month.

As I mentioned above, this bill would distort the basic concept on which the SSI program was founded by requiring the Federal Government to provide for needs of recipients on an individual basis. When your Committee originally designed the SSI program in 1971, it realized that the Federal Government could best perform the function of providing assistance on a uniform, nationwide basis, while the States could best provide for the individual needs of recipients not covered by the Federal payments. We believe that this relationship between the Federal and State responsibilities in providing for the needs of the aged, blind, and disabled is still appropriate and worthy of being preserved. Because H.R. 8912 would destroy that relationship, we strongly oppose its enactment. Moreover, a provision requiring determinations as to each individual's housing expenses would be so administratively complex as to seriously hamper the administration of the SSI program. We also oppose H.R. 8912 because of its high potential Federal cost (about $825 million in the first year following enactment)—a cost which would greatly increase the already swollen current and projected Federal deficits.

I respectfully urge your Committee not to report favorably H.R. 8912, to modify H.R. 8911 in accordance with the recommendations in this letter.

The Office of Management and Budget advises that there is no objection to the presentation of this report and that enactment of H.R. 8912 would not be in accord with the program of the President and that enactment of H.R. 8911 would not be consistent with the Administration's objectives unless amended as recommended above.

Sincerely,

DAVID MATHEWS, *Secretary.*

3. POSITION ON H.R. 8018

What is your position on H.R. 8018 which was introduced by Representative Sisk and others? What parts of the legislation do you favor and what parts of the bill do you question?

A copy of the departmental report follows:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C., October 22, 1975.

Hon. AL ULLMAN,
Chairman, Committee on Ways and Means,
House of Representatives,
Washingon, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of July 21, 1975, for a report on H.R. 8018, a bill "To amend title II of the Social Security Act to provide that when an adverse decision is made on a claim for benefits thereunder, the clamaint shall have the same right to reconsideration, including an informal conference and a statement of the case, prior to hearing; to impose time limits and make other improvements in the procedures for determining such claims; and to regularize the appointment of administrative law judges hearing such claims."

In substance, we do not oppose the provisions in paragraphs (1) through (6) of section 205(b) of the Social Security Act, as added by the bill, which would make changes in the appeals procedures of the Social Security Act. We do oppose the provision in paragraph (7), to be added to section 205(b), which would classify social security administrative law judges at a higher grade level, because we believe that, while there might well be a need to classify some administrative law judges at a higher grade level, the matter should be decided through the classification process rather than by legislation setting a specific grade level for all of them.

While we are not opposed to the provisions embodied in paragraphs (1) through (6), we should point out that enactment of them, would increase the cost of administering the program and might require additional personnel.

In addition, the provision which requires a face-to-face reconsideration interview between the claimant and the person who was a participant in making the adverse decision would be difficult to carry out because of the obvious difficulties in always having a decision maker available in every case. The Social Security Administration has been testing a face-to-face interview procedure along the lines of the provision in the bill and the preliminary findings seem promising. The major difference is that the procedure now being tested does not require that a person who participated in the decision conduct the interview; however, it does require that a person with expertise who renders decisions on claims involving the issues in question conduct the interview. We believe that this procedure will produce results that would be as satisfactory as those that would result from the provision in H.R. 8018. Also, while the provision requiring reconsideration determinations to be made within ninety days after they are requested has merit, it would be difficult to meet this objective in every case.

Paragraph 7, which we oppose, would classify all administrative law judges (ALJ's), at the GS–16 level. The decisions on the number of GS–16's and the duties of the positions are determined through the classification process. The classification of the Social Security Administration administrative law judges at the GS–15 level was done in 1967. At that time, the Social Security Administration provided analyses and documentation to the Civil Service Commission to support the classification. A comparison of the administrative law judge position to the classification of other positions involved in technical matters relating to claims under titles II and XVIII does not support the grade difference which would be created if all Social Security Administration administrative law judges were automatically classified at the GS-16 level.

The only existing supergrade positions in the Social Security Administration's field organization are the ten regional commissioners, whose responsibilities include overall coordination of all the social security programs in the region, including the nondecisional functions of the Bureau of Hearings and Appeals, and the directors in charge of two of our large program centers. The Department's Regional Directors and several other senior positions are also supergrades, but the creation of 436 GS-16 positions through a legislative decision on the classification of administrative law judges would not be consistent with the present grade patterns of the Social Security Administration or the Department of Health, Education, and Welfare.

The provisions of the bill would not have a majority inflationary economic impact.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

DAVID MATHEWS, *Secretary.*

4. HEARING GOAL

You stated on page 10 of your prepared statement that you are going to have a goal of a 90-day waiting period for a hearing but then you emphasized the difficulty of the procedures where medical examinations may be necessary and medical and vocational experts used.

In view of the present backlog and the nature of the hearing process, what is your best estimate of *when* this goal will be met? How many additional ALJ's will be required to meet this goal? Is this goal realistic?

By June 1976, we expect to be able to process the title XVI cases being heard by SSI hearing examiners within 90 days of receipt of the request for hearing. With respect to the cases which are now being handled by ALJs (e.g., title II, concurrent title XVI and title II, title XVIII, etc.), we hope to be able to reach our goal by June 1977, of issuing the hearing decision within 90 days of the request for hearing. In order to reach this goal we must eliminate the current backlog and to do this we will need to have flexibility in using the current hearing manpower available. Authorization will be needed for all hearing officers to hear cases under titles II, XVI, and XVIII. Once the backlog is eliminated, we will be able to handle anticipated receipts with the budgeted 675 presiding officers.

The 90-day processing goal is, in our opinion, realistic.

5. MEANINGFULNESS OF RECONSIDERATION

The Boyd Report contains the statement that the ALJ's believe that there are more and more "rubber stamp" affirmations by the State agencies in disability redeterminations. What are your thoughts on this? Do you believe the fairly substantial variation in State agency reconsideration reversal rates present a problem in this area? Do the ALJ's reverse more decisions from low reversal States or vice versa?

We strongly disagree with the administrative law judges who believe that there are much and more rubber stamp affirmations by the State agencies in disability reconsiderations. Reconsideration is a completely independent review of the case by a different physician/examiner team in the State agency. Often, the reconsideration examiners are of a higher grade than the initial examiners. The fact that about ⅓ of the reconsideration cases are reversed shows that the process is not a "rubber stamp" operation.

Regarding the fairly substantial variation in State agency reconsideration reversal rates, a review of the most recent statistics shows that while there are a few States which vary widely from the national rate, most of the States are close to the national average (32.9% for FY 75).

We recognize the need for more definitive regulations for evaluating cases where vocational factors must be considered. This should better assure that the same decision will be rendered at all levels of adjudication where the facts are the same. We expect to publish such regulations under notice of proposed rulemaking shortly.

We are unable to answer the question "Do the ALJ's reverse more decisions from low reversal States or vice versa?", since we do not maintain hearing reversal statistics on a State-by-State basis.

6. EXPERIENCE WITH THE DISTRICT OFFICE REMAND

The initial experience with the District office remand which shows only an 18% reversal rate seems somewhat disappointing as a device to relieve the hearing process.

What is the legal authority for the remand? If this is desirable shouldn't we have explicit authority for it in the Social Security Act? Would it also be desirable to have explicit authority for the mandatory reconsideration as is contained in the Sisk bill, HR 8018?

Currently, the reversal rate of informal remand cases processed by State agencies is about 15%. This represents about 6% of the new hearing requests. We do not consider this a disappointing figure since almost half (44.5%) of hearing requests are filed within 30 days from the date of reconsideration notice (sixty percent are filed within 60 days from reconsideration notice). In this short time, we would not expect to find many cases where there are significant changes in the claimant's condition or where there is new and material evidence.

Section 205(a) of the Social Security Act provides that the "Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions . . ." The authority for district office remands will be promulgated in the Social Security Administration's regulations in the near future. The authority for mandatory reconsideration is already contained in the regulations. The authority contained in section 205(a) is sufficient to cover both the reconsideration and remand processes.

7. FACE-TO-FACE CONTACT

On page 17 of your testimony, you indicate that to reduce appeals you may have face-to-face contact with adjudicators at the State agency. How are you going to do this in States that have highly centralized systems (one office in the State)?

The current Reconsideration Interview Study that is being tested in sixteen States does not require claimant's travel to the State agency; rather, the State agency examiner travels to the claimant. Normally, the face-to-face contact takes place in the social security office nearest the claimant's home. Other suitable locations, including the claimant's residence, have been utilized. Initially, if we were to implement face-to-face contact at the reconsideration level, we would expect most States to work out of their existing locations. We would also expect that the resulting experience would accelerate State agency plans to decentralize (currently eleven are decentralized) or encourage the "outstationing" of State agency examiners in heavily populated areas.

8. QUALITY REVIEW OF ALJ'S

In the past a Bureau of Hearings and Appeals analyst reviewed each hearing allowance to determine whether own motion review should be recommended. Edwin Yourman states that only 5% review on the average is now carried out. Is this still true? How many own motion reviews have there been this year as compared with last year?

In April 1975, the comprehensive review of favorable disability hearing decisions by hearings and appeals analysts was temporarily suspended. This action was taken so that the analysts, who provide staff support to the Appeals Council, would be able to devote full time to processing pending requests for Appeals Council review which have been filed by claimants. As a result of this action, favorable decisions issued by administrative law judges are being forwarded directly to the Bureau of Disability Insurance for payment of benefits.

We are continuing to closely monitor the reversal rate in disability cases at the hearing level. There has been no increase in the title II disability reversal rate since the comprehensive review function formerly performed in BHA was suspended.

In fiscal year 1974, 615 disability cases were reviewed by the Appeals Council on its own motion. The Council took own motion review in 297 cases in fiscal year 1975. (Prior to the suspension of comprehensive review, the Appeals Council reviewed 261 disability cases on its own motion;* since the report period ending April 26, 1975, the Council has reviewed 72 cases on its own motion.)

9. QUALITY OF DECISION

The Boyd Report states: "We recommend the Regional Chief ALJ, under the guidance of the Bureau Chief ALJ, be given well-defined authority to evaluate the performance of ALJ's on a post-decisional basis and to enforce production goals and other administrative decisions that would not infringe on the independence of judgment of the ALJ in the decision-making process. He should also be assured of a meaningful process for field input to substantive guides and instructions intended for the field."

How has this been implemented?

This recommendation was implemented by a memorandum of June 23, 1975, to all presiding officers and Regional Chief ALJs setting out the procedures with respect to the review of hearing decisions on a postdecisional basis. The Regional Chief ALJ's role in increasing productivity, providing counseling to low producers, transferring of cases from heavily impacted offices to offices with smaller backlogs, detail of ALJs to heavily impacted offices, etc., has been thoroughly discussed at several conferences, and covered in several communications.

10. SOCIAL SECURITY REVIEW OF ALJ DECISIONS

How many on-record reviews have been suggested by the Bureau of Disability Insurance? What is your reaction to program bureaus making recommendation for own-motion review by the Appeals Council which will appear in the record?

Presently the Appeals Council is dependent on the Bureau of Disability Insurance to call to its attention any disability case forwarded for effectuation which is contrary to the law, regulations, or Social Security Rulings. Since BHA's comprehensive review function was suspended, 131 requests for own motion review action by the Appeals Council in title II disability cases have been received from the Bureau of Disability Insurance. In addition, BDI had also requested the Appeals council to review 17 favorable hearing decisions issued by presiding officers in SSI disability cases.

I believe it is perfectly proper for a program bureau to make recommendations for own motion review to the Appeals Council so long as such communication is on-the-record and the claimant is afforded an opportunity to submit a rebuttal statement and any additional evidence he or she may have. Previous criticism of such requests was based on their ex parte nature. This practice is no longer tolerated.

11. PRECEDENT MATERIALS

Are the ALJ's being supplied enough precedent material to decide cases on a relatively uniform basis?

How does the material they use differ from that used by the State Agency?

Each ALJ is provided with the statute, the regulations, and the Social Security Rulings. We believe that this is sufficient precedent material for them to decide cases on a relatively uniform basis. In addition, each ALJ or the hearing office receive the CCH, Unemployment Insurance Reporter, copies of pertinent court decisions, medical and vocational texts, and other general informational material. The manuals of the other SSA components, informational in character, are available in each hearing office to acquaint ALJ's with the processing of social security claims.

Precedent material is of great importance where cases present legal, policy, and reoccurring factual issues. However, there is a tendency to overstate their value in an individualized disability program, where the effect of impairments must be evaluated as to a particular individual based on his or her age, education, and work history. We have considered the need to publish Appeals Council decisions for guidance of ALJ's. A review of the Appeals Council decisions, however, shows that they are based on the factual situation of the particular case and would be of limited use in deciding other cases. Those that may have precedent value are recommended as Social Security Rulings.

The State agencies receive. in addition to the statute, the regulations, and Social Security Rulings, detailed instructions and guidance from the Bureau of Disability Insurance.

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*The reduction in own-motion review in fiscal year 1975, prior to April 26, was due to the institution of a selected sample review on August 23, 1974, as opposed to a prior 100% review.

12. PRODUCTIVITY OF ALJ'S

The Boyd Report states: "The variance in production among the ALJ's which represents BHA's experience for an extended period of time leads to a recommendation that BHA set minimum acceptable production standards, that these be cleared with CSC, that they be published to ALJ's and that they be enforced rigorously.

It is our understanding that you did not implement this recommendation but are pursuing an alternative route in encouraging increased productivity for some ALJ's. Would you please explain?

The recommendation proposes minimum and acceptable production standards for administrative law judges. The hearings and appeals process does not lend itself to the type of production operation suggested by the recommendation for stringent performance standards. The requirement for a quality and indepth decision-making process is our dominant concern. Furthermore, in some instances, the establishment of performance may be counter-productive, because people tend to meet the standard and not exceed it. It should also be noted that during the past few months case disposition has been at an all time high. Steps have been taken to extricate the presiding officers with all non-judicial functions and to provide them with the necessary equipment and personnel to accomplish their objectives. Finally, we have also instituted peer counseling of low-producing presiding officers. The effect of all these steps will be carefully monitored to determine the highest production possible without the imposition of performance standards. Only then, if it is determined that the measures outlined above and others which will be instituted do not, or cannot, raise the number of case dispositions to an acceptable level, will we consider the establishment of performance standards. If it becomes necessary to consider such standards, they will be established only on an as needed basis.

13. ALJ PRODUCTIVITY

Please give for the latest period available the productivity figures for the full time ALJ's on an annual basis; give by 50 case intervals. Number of ALJ's 0–50, 50–100, etc.

The following chart shows the breakdown of the 392 Title II ALJ's production in fiscal year 1975 at 50 case intervals.

Cases processed during fiscal year 1975:	*Number of title II ALJ's*
0 to 50	0
51 to 100	8
101 to 150	32
151 to 200	106
201 to 250	125
251 to 300	76
301 to 350	29
351 to 400	11
over 401	5

14. REMAND BY ALJ

If it is found desirable to allow ALJ's to remand cases back to the State agencies for further development, will this require new legislation or can it be done by regulation?

Why is SSI different in this regard?

If it is found desirable to permit ALJ's to remand cases for further development, it can be done by promulgating regulations. The regulations covering title XVI cases provides for remand where new and material evidence is received, or there is a change in law, regulations, or other precedents which would permit favorable findings and expedited payment to the individual. A similar regulation covering titles II or XVIII will be published in the near future.

15. ORAL DECISION

Some ALJ's argue that since the Bureau of Hearings and Appeals does not review their decisions under present procedures that they be authorized to issue oral decisions. What is your reaction to this suggestion?

From time to time the feasibility of presiding officers issuing oral decisions at the conclusion of hearings has been considered. For various reasons the procedure has not been implemented.

Presently the regulations require that presiding officers' decisions shall be in writing and a copy shall be mailed to the parties (Regulations No. 404.939, 405.1557, 410.654, and 416.1457). Therefore, a change in regulation would be required to authorize the issuance of oral decisions.

Presumably the ALJ's suggestion pertains only to those cases where the presiding officer feels, after concluding the hearing, that a fully favorable decision could be rendered from the "bench" without further review of the record. This would probably occur infrequently, since a presiding officer can render a fully favorable decision without holding a hearing. Therefore, when a hearing is held, the presiding officer must feel that additional information is needed. The acceptance of what took place at the hearing without studying it in relationship to the total record could result in some dubious decisions. It seems to us that in the vast majority of cases some additional study would be required.

Even if an oral decision were rendered at the conclusion of the hearing, the decision would still have to be later reduced to writing because it would be needed for effectuation purposes. From a practical standpoint, not much would be accomplished by rendering an oral decision since a written decision still must be issued. A preprinted fully favorable form decision can be used in the majority of cases which require a minimum of staff time to prepare.

The discussion above is limited to fully favorable decisions. Obviously the problems would be even more numerous if the decision were unfavorable. The Administrative Procedure Act requires that the decision "shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

In a complex highly judgmental disability evaluation program it would be extremely difficult to render an unfavorable decision from the "bench" which would include specific findings and full rationale on all points in issue.

16. PARA-LEGAL PERSONNEL IN THE HEARING PROCESS

Several years ago in an attempt to provide paralegal assistance to ALJ's, the Bureau of Hearings and Appeals created, on an experimental basis, the position of Professional Assistants.

What is the purpose of this program, the grade of assistants, and what has been the result of this experiment?

The experiment that was conducted was too limited to form any meaningful conclusions. Only 25 "professional assistants" were involved and they were used in a variety of ways to provide professional assistance to the ALJ's to increase productivity. Recently, a number of hearings and appeals analysts, who assist the Appeals Council, were detailed to assist ALJs in the drafting of decisions, and to undertake under the ALJs direction documentation of complex cases. The increase in ALJ productivity was very gratifying. Based on the results achieved close to 200 staff attorneys were recently appointed to provide professional assistance to ALJs. The program is being closely monitored and will be evaluated after it has been in operation a few months.

17. APPEALS COUNCIL

Please describe the activities of the Appeals Council. As presently constituted is it playing a meaningful role in the process? What do you think of proposals to make it purely an appellate body?

Presently, the regulations provide that any party to a hearing decision or dismissal has the right to request a review by the Appeals Council if they are in disagreement with such action. When a request for review is filed, the claim is thoroughly reviewed by a hearings and appeals analyst. The individual prepares an analysis of the case and a recommendation to the Appeals Council as to whether the request for review should be granted or denied. Any deficiency in the record is noted and any new evidence is discussed. The Appeals Council reviews the recommendation and the file, as appropriate, and either grants or denies the request for review. If the request for review is granted additional evidence may be secured and/or the case may be remanded to an ALJ for further proceedings and a new decision. Where the Appeals Council does not remand the case, the Council completes the record, the claimant is given an opportunity to submit additional evidence, a brief, and may appear before the Council to present oral argument. When the Appeals Council has concluded that the record is complete, it issues a decision affirming, modifying, or reversing the ALJ's decision.

The Appeals Council works in panels. Any decision of the Appeals Council on review is issued by a panel of at least two members. Where important questions of policy, interpretation of law or regulations is involved, the Appeals Council may consider the case en banc.

The review by the Appeals Council has been principally a de novo review; a fourth level of adjudication. In our opinion, making a fourth evaluation of an individual case has not been a very meaningful role for the Appeals Council. However, the volume of cases before it has inhibited the Appeals Council from taking a more meaningful role. We believe that the Appeals Council function must be restructured to provide more precedent guidance to the presiding officers in order to insure greater uniformity in hearing decisions. The Appeals Council must devote a substantial part of its time to effectively monitoring the hearing and decisional processes. To this end, I believe it must serve more as an appellate body, and it may be necessary to limit the areas wherein Appeals Council review may be requested. The SSI regulations provide for the Council to function more as an appellate body, and similar changes are planned for the OASDI program. In addition, we are considering the legal propriety of:

(1) eliminating the right to request Appeals Council review, but have the Appeals Council retain the right to review on its own motion all decisions and dismissals issued by presiding officers;

(2) limiting the right to request Appeals Council review to questions of law, and to objections raised or exceptions taken at the hearing;

(3) providing the claimant with the option of seeking Appeals Council review, or filing a civil action directly from the presiding officer's decision; and

(4) closing the record at the hearing and having any Appeals Council review limited to the record established at the hearing; where the record was inadequate, the case would be remanded to the presiding officer.

18. MANAGEMENT INFORMATION SYSTEM

What has happened to your automated management information system—how long has it not been functioning—do you have manual back-up systems?

The Boyd Report states: "Because of lack of usable management information, especially in the areas of processing time and ALJ production, the task force devised the study described later in this report." Certainly basic management information of this type must be readily available if BHA management and administrative personnel are to identify and resolve existing problems."

BHA currently has seven computer systems analysts designing an automated management information and case control system. Phase I was completed nationwide on July 19, 1975, and is successfully operating. Phase I's primary goal was to permit personnel to locate and determine the status of any hearings and appeals case within seconds using an on-line terminal query system. Phase I will also allow limited management information. Information on SSI processing times is currently our primary focus of attention. Phase II, scheduled to be operational by March 1976, will provide a totally automated management information system. BHA has a manual back-up system for management information that will run parallel until Phase II is operating successfully.

19. AGENCY SEPARATION UNDER THE APA

Is it legal under the Administrative Procedures Act for regional personnel of the Bureau of Disability Insurance, acting in a hearing assistant role, to recommend decisions to ALJ's?

Has this occurred?

I believe the question concerns the recent screening of pending hearing cases by disability examiners of the Bureau of Disability Insurance for the possibility of immedaite favorable action. Where a case was identified as appropriate for immediate favorable action it was returned to the State Agency for action provided the State Agency had agreed to participate. Where the State Agency was unwilling or was unable to participate, the case was referred to an ALJ for an immediate on-the-record review. If, based on his or her review, the ALJ felt that a fully favorable decision should be issued without the need of holding a hearing, such action was taken. The ultimate decision and responsibility was that of the ALJ. No effort, direct or indirect, was made to influence the decision.

I do not believe that the identification of cases for an ALJ's consideration that may be allowable based on the present record is illegal. There is no question but that it expedited the claimant's receipt of a favorable decision where the ALJ agreed, and the removing of these cases from the docket also expedited the receipt of hearings for other claimants.

20. ADVERSARY PROCEEDING

The Association of HEW Administrative Law Judges recommends that all hearings conducted by ALJ's be designated as "adversary in nature," and that the Secretary be required to appear to defend his last determination.

What would be the effects of such a change in terms of fairness to the claimant and the administration of the system?

It has sometimes been stated that because Social Security is a nonadversary proceeding this makes it less difficult and, thus, those that conduct such hearings should be at a lower grade than those that conduct adversary hearings. What do you thing of this type of reasoning?

As you know the social security program is based on contributions to trust funds by workers during their working lifetime. Benefits are considered an earned right. The role of the Social Security Administration has been to see that those who are entitled to benefits receive them and those that are not do not get them. While claimants have the burden of proving their eligibility, traditionally the Social Security Administration has provided such assistance as is needed. This is how it should be at all levels of adjudication. I do not favor assuming an adversary role at the hearing level. More than 60% of the claimants appearing at hearings are not represented by attorneys. Those claimants would be at a severe disadvantage in an adversary setting. Even where the claimant is represented by an attorney, most of the attorneys are general practitioners of law and, although well qualified, would be at a disadvantage when opposing an individual who is engaged full time in social security law.

I believe that the argument that the conduct of a non-adversary hearing is "less difficult" is totally without merit. In fact, the opposite may be true. In an adversary proceeding both sides are responsible for presenting their case, including any research on questionable points of law. The administrative law judge can generally rely on the parties to bring into focus all disputed facts and legal issues and, if not, can direct them to present evidence on the issues and briefs on questions of law. However, in an no-adversary beefit hearing, the presiding officer is responsible for insuring that the claimant's case is properly presented, that the government's interest is properly protected, and then must make an impartial decision, doing his own defining of the issues, research, etc. I submit that this may be a more difficult role than that of an administrative law judge in an adversary proceeding. In any grade classification this should be taken into consideration as well as the complexity of the issues to be decided.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., October 15, 1975.

Hon. JAMES A. BURKE,
Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This has reference to your letters of September 23 and September 30, 1975, confirming the date of the further hearing of the Subcommittee on Social Security for the afternoon of Monday, October 20, 1975.

In line with the request in your letter of September 23, the information the Subcommittee is seeking on five general issues is contained in the enclosure to this letter. Comments with respect to H.R. 8911 and H.R. 8018 will be furnished to you as soon as possible.

Sincerely yours,

ROBERT E. HAMPTON, *Chairman.*

Enclosure.

Question: Do you believe you have legal authority to question an agency request for what it considers to be the appropriate number of ALJ's?

Answer: Yes. . . . The authority has been used frequently. The Commission's authority is found in section 11 of the Administrative Procedure Act. This section provides that, "Subject to the Civil Service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 * * * ."

This section further specifies the manner in which cases are to be assigned, prohibits the performance of duties inconsistent with examiner responsibilities, provides for a determination of good cause by the Commission after a hearing if an examiner is to be removed; provides that compensation shall be prescribed by the Commission; the selection by the Commission of examiners for loan to other agencies.

To carry out the foregoing purposes, section 11 specifically authorizes the Commission, among other things, to make investigations, require reports by agencies, promulgate rules and subpoena witnesses or records.

Authority is also to be found in section 5108(a), title 5, USC.

Question: Why did you override the interpretation of the Department of HEW that SSI was under the APA?

Answer: After considering the advice of its General Counsel, the opinion of the Office of Legal Counsel of the Department of Justice and the view of interested parties, the Commission determined that 1631(d)(2) (SSI) contained a clear exemption ("qualified person may be appointed to serve as hearing examiners * * * without meeting the specific standards prescribed for hearing examiners") and the legislative history supported this conclusion ("although the examiners would not be selected under the conditions set forth in the APA"). Accordingly, the Commission held that the law did not require section 3105 APA ALJ's. The more detailed reasons for the Commission's decision are contained in the accompanying copies of the General Counsel's opinion and the decision of the Commission.

Question: Have you ever overridden the opinion of another administrative agency that it was under the APA?

Answer: The Commission, as well as the Office of Administrative Law Judges, on numerous occasions in recent years has determined that legislation on which requests for ALJ's have been based did not require section 3105 APA ALJ's. These determinations have been made in connection with requests from: DHEW (Social Rehabilitation Services); Department of Justice (Law Enforcement Assistance Administration); the Department of Commerce (Maritime Administration); the Department of Commerce (Maritime Administration); the Department of Labor; the Federal Reserve Board, etc.

Question: How many Social Security ALJ's have been removed for cause?

Answer: Only one.

Question: What is the most recent case? How many have been removed for lack of productivity and/or the quality of their adjudications?

Answer: The only removal occurred in 1963. No one has been removed for lack of productivity; no one has been removed because of quality of adjudication.

Question: What is the basis for the classification of Social Security ALJ's at the GS-15 while "most" of those of the regulatory agencies are classified at GS-16? Would you give the documentation for this decision?

Answer: I do not concur with the statement that "most" of the ALJ's in the regulatory agencies are classified at GS-16. In addition to the SSA, ALJ's are classified at the GS-15 level in seven additional agencies, as follows: HUD, Drug Enforcement Administration, EPA, Department of Labor, Bureau of Alcohol, Tobacco and Firearms, U.S. Intern'l. Trade Commission, the Department of Transportation (Coast Guard).

The advisory opinion underlying the Commission's reclassification decision of 1967 is annexed.

Question: How many ALJ's, GS-16, of the regulatory agencies have been assigned to do Social Security cases during the current workload crisis? If none have been assigned, is this because they lack expertise or the work is considered to be below their job classification? Does this square with the concept of a common corps of hearing officers?

Answer: None has been assigned. This has not been due to any lack of expertise (ALJ's in other agencies have had prior SSA experience) nor have classification factors been involved (GS-16 ALJ's have been loaned in the past to agencies whose ALJ's are at the GS-15 level, i.e., HUD, Drug Enforcement Administration, SSA).

I am not aware of any statutory basis for the statement that a concept of a "common corps" of hearing officers exists. The APA specifically indicates that appointments to these positions are made by and for agencies; the ALJ's are the employee of the separate Departments and agencies.

Question: Mr. Dullea has stated that Railroad Retirement is not under the APA. Does not this program have a hearing on the record with ultimate appeal to the Federal Judiciary on a hearing record? Why doesn't this bring it under the APA?

Answer: The record of the hearing before the Subcommittee on 9/19/75 does not indicate that Mr. Dullea stated that the Railroad Retirement Board is not under the APA. The record indicates (pg. 83) he stated that the Railroad Retirement Board did not employ ALJ's. This was a correct statement of fact. The Railroad Retirement Board does not employ section 3105 ALJ's; it has never asked the Commission to furnish ALJ's.

[Memorandum]

Subject: Hearing Examiners in the Department of Health, Education, and Welfare.
From: Gilbert A. Schulkind, Director, Bureau of Inspections.
To: Wilson M. Matthews, Director, Office of Hearing Examiners.

The Department of Health, Education, and Welfare has submitted a new description for the Hearing Examiner position in the Social Security Administration. The Department has requested grade GS-15 for the position on the basis of additional duties resulting from amendments to Title II of the Social Security Act, the addition of Title XVIII of the Act, and the addition of hearings under Title VI of the Civil Rights Act.

The hearing examiners in Social Security Administration were classified by the Civil Service Commission in grade GS-14 in 1962. In 1964, Commissioner Ball requested that the three Civil Service Commissioners personally review the 1962 decision. He cited as justification for grade GS-15, the significant increase in medical testimony, often conflicting, obtained from expert witnesses at hearings. The Commissioners sustained the 1962 evaluation and denied grade GS-15.

The Bureau of Executive Manpower recently rendered an advisory classification opinion on a hearing examiner position in the Office of Education, DHEW, proposed for grade GS-16. The conclusion was that the position did not evaluate to grade GS-16. BEM did not make a grade decision, but considered the difficulties of the cases processed by the Office of Education to be on par with those processed by the Social Security Administration.

BEM recommended that the total problem of grade levels for hearing examiners engaged in Title VI work be considered when making grade proposals.

Hearings in the Social Security Administration are concerned with:

Cases of alleged discrimination arising under Title VI of the Civil Rights Act and involving:

Providers of services.

Agencies whose programs are administered by the Service, such as Agriculture's Food Program.

Appeals by hospitals and various health and care institutions and agencies dissatisfied with the determination that they do not meet the licensing and regulatory provisions covering "Providers of Services" under Title XVIII.

Appeals by individuals from determination involving entitlement and/or amount of hospital services or medical and health services or to old age and survivors' benefits under Title II and amendments to the Social Security Act.

Hearing examiners in the Office of Education are concerned with the administration of Title VI of the Civil Rights Act involving:

Cases where public school systems have not adopted acceptable desegregation plans.

Alleged violations of accepted desegregation plans.

Cases where type of educational institutions other than public schools fail to comply with non-discrimination requirements.

Comparable aspects of the Title VI cases assigned to the two hearing examiner positions, in addition to similarity of amounts of money that may be withheld are:

Patient population, balanced professional staff, protests of patients and professionals, hospital cases cover one institution, school population, balanced teaching staff, protests of parents and teachers, and school cases cover one district.

The hearing examiners in the Social Security Administration probably have a greater volume and variety of cases because of the individual appeals under Title II and XVIII. However, the many facets involved in the school district cases would seem to compensate for the volume of individual cases.

We have compared the positions with the published standards for the General Attorney Series GS-905. We have taken into consideration the impact of the Title

VI cases on the public; the importance of the precedent-setting action; the delicacy of the situations; and the large amount of money involved. The standards provide two factors for determining the difficulty and responsibility of attorney positions. We have applied these factors for the hearing examiner positions: (1) Types of cases or problems and (2) level of responsibility.

Type II cases are characterized by:

Difficult legal or factual questions because of absence of clearly applicable precedents.

Cases are strongly contested by highly competent legal counsel.

Cases have an impact which affects a significant segment of private or public interest, either economically, socially, or politically, and involve large sums of money, about $100,000.

Type III cases are characterized by:

Legal questions or factual issues extremely complex.

Large sums of money involved (approximately one million).

Cases are vigorously contested.

Have important impact on major private or public interest. (Major extension or revision in a status and/or other grant programs, or a nationwide retirement system; a substantial question of civil rights involving the due process clause, or defining legal rights.)

Problems of unusual delicacy.

It is our opinion that the Title VI cases now assigned to the hearing examiners have characteristics more nearly like those defined for Type III. Large sums of money are involved (one case cited in HEW involved $70 million withheld from Alabama). Cases are vigorously contested. The cases have a significant impact on both private and public interests.

We have rated the overall responsibility of the positions as level E, which is the highest of five levels of responsibility defined in the standard. We determined level E on the fact that the hearing examiner decides difficult questions and renders final decisions for action by the Commissioners.

Type III cases with Level E responsibility, according to the GS–905 standards, convert to GS–15.

In the Commission's 1964 review of the Social Security hearing examiners, comparison was made with Coast Guard hearing examiner positions, which had been placed in grade GS–15 by application of the standards for General Attorney GS–905. The Commission recognized the decisions of the Coast Guard hearing examiners as final decisions, although there was the right of appeal to the Commandant of the Coast Guard. At that time, Coast Guard positions were considered clearly one grade better than the HEW positions. About 85% to 90% HEW cases were disability claims, which were consdiered "neither complicated nor contraverted." The Coast Guard hearings concern licenses of specific individuals under Maritime Law and acts of incompetency or misconduct. With the advent of Title VI cases and the large amounts of money involved (as cited above where one case involved $70 million,) we believe the complexity of the work of the HEW hearing examiner has increased to the extent that the positions now merit grade GS–15. We may note here that one Coast Guard hearing examiner position has now been classified in grade GS–16.

A number of agencies requiring hearings in non-discrimination—Federally assisted programs have hearing examiner positions in grade GS–16, such as Labor and Agriculture, but their grades were not based on hearings under the Civil Rights Act. Agencies that are specifically concerned with the effectuation of Title VI of the Civil Rights Act of 1964, are: Interior, Agriculture, Labor, General Services Administration, Housing and Urban Development, National Science Foundation, and Health, Education, and Welfare. GSA, HUD, and NSF have not established hearing examiner positions. They are assigned examiners when hearings become necessary.

It is our opinion that because of the complexities of cases arising under Title VI of the Civil Rights Act and under Title XVIII of the Social Security Act, the responsibilities of the Hearing Examiner (Licensing and Benefits) Social Security Administration, have increased significantly and the positions may now be more appropriately classified in grade GS–935–15.

Likewise, we believe that the position of Hearing Examiner (Civil Rights), Office of Education, because of the operations in a relatively unprecedented area of civil rights, merits GS–15.

Attachment.

May 9, 1973.

Mr. Wilmot R. Hastings,
General Counsel, Department of Health, Education, and Welfare,
Washington, D.C.

Dear Mr. Hastings: This refers to your letter of April 9, 1973, which requests that we help resolve the current question of whether Administrative Law Judges appointed under section 3105 of title 5, United States Code, are required to preside over hearings to be held under title XVI of the Social Security Act beginning January 1, 1974. After carefully considering the arguments which have been presented with regard to this question it is my opinion that section 3105 ALJs are not required to preside over these hearings. Rather, it is the power of the Secretary of HEW to appoint individuals to fill these positions as he would other positions at HEW. As a result, I do not feel that the Civil Service Commission should provide section 3105 ALJs to conduct these hearings. While I reach a conclusion different from yours in this matter, I recognize the weight of the arguments you have presented in favor of APA application. Therefore, I would gladly join with you in pressing for an opinion of the Attorney General to resolve this basic conflict, particularly since the consequences of proceeding incorrectly, i.e., upset in the courts, is a matter in which the Department of Justice will bear litigation responsibility.

For purposes of determining the applicability of the APA the language Congress has given us in title XVI is terribly ambiguous. On the face of the statute alone I could not conclude that Congress intended the APA to apply. I would, in fact, reach the opposite result. Given the recent specificity in other legislation with which Congress has made the APA applicable,[1] given the absence of an explicit requirement that title XVI proceedings are to be determined "on the record", and given the clearly intended similarity between the statutory procedural provisions for SSI hearings and those for OASDI hearings under title II, (42 U.S.C. § 405),[2] I could not conclude from the title XVI language alone that these hearings should be considered "cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing" within the meaning of subsection 594(a) of the APA.

Title XVI provides only for "reasonable notice and opportunity for a hearing." There is no explicit requirement that the determination be made "on the record" as required by subsection 554(a). Often the requirement of "the record" can be read into a statute by looking to the statutory provisions for judicial review.

"... while the Securities and Exchange Act does not expressly require orders of denial of registration to be made 'on the record', such a requirement is clearly implied on the provision for judicial review of these orders in the circuit courts of appeals. Upon such review, the Commission files 'a transcript of the record upon which the order complained of was entered', and 'The finding of the Commission as to the facts, if supported by substantial evidence shall be conclusive.' "

(Attorney General's Manual on the Administrative Procedure Act 42 (1947)). It should be noted that the judicial review provision for OASDI hearings under title II (42 U.S.C. § 405(g)) contains language virtually identical to that cited by the Attorney General, *supra*, i.e., language which may be read to imply the record requirement. Section 405(g) provides that "the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

It is interesting that in enacting title XVI Congress, although incorporating section 405(g) by reference, provided an exception to the key language quoted above. Subsection 1631(c)(3) provides:

"The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 205(g) [42 U.S.C. § 405(g)] to the same extent as the Secretary's final determination under section 205 [42 U.S.C. § 405] *except that the determination of the Secretary after such hearing as to any fact shall be final and conclusive and not subject to review by any court.*" (Emphasis added.)

The language of subsection 1631(c)(3) certainly does not square with the former section 10(e), the judicial review provision of the APA, (5 U.S.C.

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[1] *See, e.g.,* section 14 of Public Law 92–576 (Longshoremen's and Harbor Workers' Act Amendments of 1972) which provides "Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any hearing shall be conducted by a hearing examiner qualified under section 3105 of that title."

[2] See H.R. No. 92–231, 92d Cong., 1st Sess. 341 (1971) which states: "Section 2031(d)(1) [new subsection 1631(d)(1)] provides that . . . subsections (a), (d), (e), and (f) of section 205 of the Act, will apply with respect to benefits under title XX [now title XVI] to the same extent as they apply to OASDI benefits . . ."

§ 706), which requires the reviewing court to look at the "whole record." Rather, it precludes the court from reviewing the evidence in the record since the Secretary's findings of fact are not reviewable. The language also negates the APA requirement that the reviewing court hold unlawful findings and conclusions found to be "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." (5 U.S.C. § 706(2)(E)). And it is clear that Congress intended the "whole record" requirement to permit courts to review findings of fact.[3] In essence, rather than incorporating the record requirement in title XVI, Congress has negated it.

Given the ambiguity of the statutory language a clear statement of legislative intent would be helpful. However, the only pertinent legislative history appears to be that which you have cited, (H.R. Rep. No. 92–231. 92d Cong., 1st Sess. 156 (1971)), and that language is not clear as to whether the APA specifically applies or is only to serve as a model for proceedings under title XVI. The pertinent part of the House Report states that "full hearings would be otherwise conducted *in accordance with the requirements* of such act which include, for example, the right to submit evidence, to cross examine witnesses, to be heard by an impartial examiner and to a decision based on the hearing record." (Emphasis supplied) This, of course, falls somewhat short of a Congressional statement in the text of legislation that "the provisions of sections 554, 556, and 557 of title 5 of the United States Code will apply to hearings under title XVI."

There is some further reference to the applicability of the APA in the House floor debates, (*See*, 12 Cong., Rec. H. 5658 (daily ed. June 22, 1971), but one must be wary of basing Congressional intent on the statement of individual members of only one of the two houses of the legislature, particularly where even the more broadly based Committee reports are ambiguous on the same issue.

Even assuming that the APA is applicable to those proceedings, however, does not dictate a requirement that those employees who preside over the hearings must be ALJ's appointed under section 3105 of title 5 for section 1631(d)(2) expressly modifies the application of the APA with regard to hearing examiners in these proceedings. The pertinent section provides:

"(2) To the extent the Secretary finds that it will promote the achievement of the objectives of this title, qualified persons may be appointed to serve as hearing examiners in hearings under subsection (c) without meeting the specific standards prescribed for hearing examiners by or under subchapter II of chapter 5, United States Code."

First, I don't think there can be any doubt that this language expressly supersedes the APA within the meaning of section 559 of the APA. The reference to "subchapter II of chapter 5" is a direct reference to the codified position of the APA and the language "without meeting the specific standards" clearly indicates that an exception to the APA is intended. With respect to exemption from APA, language much less explicit than the present has been held to modify the APA. As the Supreme Court has stated:

"Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provision of that Act." (*Marcello* v. *Bonds*, 439 U.S. 305, 310 (1955).

Therefore, in the final analysis, the question of whether ALJ's must preside over title XVI proceedings depends on the extent and effect of this modification. In my opinion, subsection 1631(d)(2), at a minimum, supersedes the APA with regard to the appointment of hearing examiners, i.e., subsection 1631(d)(2) supersedes the provision in the APA which provides that:

"There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title."

(5 U.S.C. § 556(b)). As a result, section 3105 ALJs are not required, and need not be supplied by the Commission. The appointment of officers to preside over these proceedings is left to the discretion of the Secretary and he may appoint

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[3] "The requirement of review upon the 'whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even destroy that case." (Sen. Doc. No. 243. 79th Cong., 2d Sess. 214, 280 (1946); See also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951)).

individuals as he sees fit. I believe this view is supported by the previously cited legislative history which states that "the Secretary would establish the requirements to be used in selecting hearing examiners . . . the examiners would not be selected under the conditions set forth in the Administrative Procedure Act . . ." (H.R. Rep. 92–231, *supra* at 156).

You argue that absent a "finding" by the Secretary section 3105 ALJs must be appointed to preside and such an interpretation certainly has its merits. To be sure, to clear the air on this matter such a finding is certainly desirable, but I cannot agree that the lack of the finding requires the Commission to provide section 3105 ALJs. In my view, the language of subsection 1631(d)(2) by its own operation completely supersedes the requirements of subsection 556(b) and relieves the Commission of the responsibility and the duty of providing section 3105 ALJs.

In reaching this conclusion I am not unmindful of the concern that failure to appoint section 3105 ALJs could result in an adverse court decision, i.e., a decision that ALJs are required, thereby necessitating the rehearing of many cases under title XVI. However, I think that the language of the Supreme Court in a recent decision sufficiently allays this concern. (*Richardson* v. *Perales*, 402 U.S. 389 (1971)). In that case Perales challenged the procedures employed in OASDI hearings, procedures which, as noted above, are based on statutory provisions, which are closely akin to those in title XVI. One of Perales claims was that the APA should be applicable to OASDI proceedings. He argued that since the hearing examiner has the responsibility for gathering the evidence he would naturally lean toward a decision in favor of the evidence he had gathered and that "an independent hearing examiner such as in the Longshoremen's and Harbor Workers' Compensation Act should be provided." (*id.* at 409). The Court declined to decide the question of the general application of the APA, thereby leaving intact the Fifth Circuit's holding that it was not applicable. (*See Perales* v. *Cohen*, 412 F. 2d 44 (5th Cir. 1969)). But it did explicitly reject the hearing examiner contention:

"Neither are we persuaded by the advocate-judge multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts. The 44.2% reversal rate for all federal disability hearings in cases where a state agency does not grant benefits . . . attests to the fairness of the system and refutes the implication of impropriety." (*Richardson* v. *Perales*, *supra*, at 410).

This language seems clearly to indicate that the Supreme Court feels that the requirements of due process do not demand the elastic adversary-type hearing in social security disability hearings, (and I don't believe anyone would seriously contend that the present disability hearings are of this adversary nature). Instead, the Court only requires that these hearings be fundamentally, fair (*Richardson* v. *Perales*, *supra*, at 410). It is therefore unlikely that the Court would require more highly-adversary type hearings in the closely similar hearings which will be held under title XVI, i.e., hearings which would require section 3105 ALJs. A further practical consideration in this regard is the ninety day time limit for determinations in title XVI hearings imposed by subsection 1631(c)(2). Even under the present nonadversary disability proceedings, final determinations are seldom, if ever, reached in ninety days. To impose the adjudicatory formalities concomitant with more-highly adversary hearings before an ALJ would certainly make the ninety day limit unobtainable. Therefore, I do not feel that Congress contemplated, nor would the courts require, that the procedure accorded to the classic type of adversary hearings be accorded under title XVI. It seems to me that what is said above that Congress contemplated a system similar to that presently employed in OASDI proceedings which, although ensuring most of the fundamental procedural safeguards of the APA, does not require appointment and presence of ALJs.

You have pointed out on page 2 of your letter that even if the Secretary makes a finding and appoints presiding officers other than section 3105 ALJs, you feel that the HEW performance rating system would not be applicable to these presiding officers. I agree that agency control over these employees should be kept to a minimum in order to insure their impartiality, and that the Secretary should take those steps he deems necessary toward this end. It should be noted, however, that even section 3105 ALJs are not completely divorced from possible agency pressure since despite statutory exclusion of ALJs from agency performance ratings, (5

U.S.C. §§ 4301, 4302), an agency may still initiate removal proceedings. (5 CFR §§ 930.221 *et seq.*).

As I noted above, a specific finding by the Secretary would eliminate all doubt as to whether ALJs were required, and I understand from page 2 of your letter that you agree with this position. As well as ensuring that we are on sound legal ground, I think such a finding would be administratively desirable. Fulfillment of SSA's responsibilities under title XVI will require the appointment of a large number of presiding officers, perhaps as many as 400. It has not been argued that the work of these examiners would justify classification at the GS-15 and GS-16 levels that are usually reserved for section 3105 ALJs and, in fact, your Department has requested ALJs at grade levels of 13 and 14 to preside at SSI hearings. From a strictly administrative standpoint, it would appear beneficial for your Department to maintain the authority and power to fill these positions rather than relying on ALJ registers of the Commission which may not, at least initially, provide a sufficient number of ALJs who are (1) qualified and (2) will accept work at these grade levels. In addition, maintaining the appointment power at HEW would provide greater administrative flexibility within the SSI program. As a result, individuals appointed as hearing examiners could be freely moved into and out of the program as they acquired the necessary experience and expertise to assume different positions.

In summary, it is my view that the language of title XVI, the related legislative history, and pertinent court decision indicate that the Commission is not required to provide section 3105 ALJs to preside at SSI hearings. In addition, administrative considerations favor the proposition that maintenance of the appointment power for these positions should rest with HEW not the Commission. Therefore, I feel that the Commission's Office of Administration Law Judges may properly refuse your Department's request for section 3105 ALJs for these hearings.

Sincerely yours,

ANTHONY L. MONDELLO,
General Counsel.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., December 14, 1973.

Hon. CASPAR W. WEINBERGER,
Secretary of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. SECRETARY: This has further reference to your letter of October 12, 1973, regarding the implementation of the new Supplemental Security Income Program established by Public Law 92-603, for which a large number of hearing officers will be necessary, and my responding letter of October 30, 1973.

Following that exchange of correspondence, the Commission received a number of representations for reconsideration of the question of whether these positions should be filled by Administrative Law Judges under the Administrative Procedure Act, and further that the issue be decided by the full Commission. A Commission meeting on the issue was held on December 3, 1973, at which time information was submitted to the Commissioners by representatives of your Department and interested professional associations. Following the Commission meeting Deputy Commissioner Arthur Hess and others made further written representations to the Commission. (A summary of the December 3 meeting is attached.)

This question on the requirements for Administrative Law Judges appointed under section 3105 of title 5, United States Code (hereinafter ALJs), has been the subject of extensive analysis and consideration both with regard to the legal issue of whether ALJs are required for title XVI hearings, as well as the issue of whether as a matter of policy ALJs should preside over these hearings. Upon considering this matter further, it is the conclusion of the Commission that the legal issue is paramount and must control its decision in this case. In the absence of a statute which requires ALJs as mandated by section 554 and 3105 of title 5, United States Code, and section 930.203(c), Code of Federal Regulations, the Commission will not depart from the command of these provisions.

With respect to staffing problems facing the Department, namely, the classification of the SSI hearing officer positions in the APA ALJ GS-935 series, you recognize on page 4 of your letter of October 12 that this classification series is restricted in its coverage to positions coming within the purview of the APA, more specifically, those encumbered by persons appointed pursuant to the requirements of section 3105. On November 24, 1972, and March 28, 1973, the Commission's Director, Office of Administrative Law Judges, after considering requests from the Department and from Director of the Bureau of Hearings and Appeals, indicated that the Commission could not, on the basis of the provisions in section 1631, classify these positions under the APA as ALJs. In addition, in his letter of March 28, 1973, the Commission's Director, OALJ, stated that the Chief of the Program Development Division of the Commission's Bureau of Recruiting and Examining would be happy to provide any assistance that may be needed in establishing and recruiting for any positions covered by title XVI.

Subsequently, the Department presented the question to the General Counsel of the Commission who on May 9, 1973, by letter to the Department's General Counsel (copy attached) issued his opinion in this matter. In that opinion the Commission's General Counsel concluded (1) that neither the express language of the statute nor its legislative history indicated that title XVI hearings should be considered "cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing" within the meaning of subsection 554(a) of title 5, United States Code, and that therefore the APA did not apply to title XVI hearings, and (2) that even assuming that the APA did apply, the language of title XVI, the related legislative history, and pertinent court decisions indicated that in view of the exception provided in section 1631(d)(2) the Commission is not required to provide section 3105 ALJs to preside at SSI hearings.

Among other things, the General Counsel's opinion noted the absence of a requirement that title XVI cases be determined "on the record"; the finality of the determinations of the Secretary as to any fact which is not subject to review by any court; the legislative history (H.R. Rep. No. 92-231, 92nd Cong., 1st Sess. 156 (1971)) and the decision of the Fifth Circuit Court of Appeals (*Cohen* v. *Perales*, 412 F.2d 44 (1959)) which concluded that "the Administrative Procedure Act does not control the method of conducing hearings under the Social Security Act, if in conflict therewith . . .", which question the Supreme Court found it unnecessary to decide.

The General Counsel of your Department then presented the question to the Assistant Attorney General, Office of Legal Counsel, Department of Justice. His memorandum, based upon a review of the legislative history, indicates at several points that SSI hearing examiners are exempt from the APA (Pgs. 22-23, 25, 26) and that the Department should proceed with HEW-appointed, non-APA examiners.

Although the legislative history of title XVI is admittedly sketchy and somewhat ambiguous it is the Commission's opinion that it is sufficiently clear to establish that section 3105 ALJs are not required for SSI hearings. The House Report (H.R. Rep. No. 92-231, 92nd Cong., 1st Sess. 156 (1971)) contains the following language regarding the execption provided in section 1631(d)(2):

"Your committee recognizes that many qualified persons who would be capable of hearing issues that arise under the programs may not meet the specific requirements for appointment as hearing examiners under the Administrative Procedure Act, but might be a good source of examiners to hear issues arising under the program. *Therefore, under your commitee's bill, the Secretary would establish the requirements to be used in selecting examiners. Although the examiners would not be selected under the conditions set forth in the Administrative Procedure Act*, full hearings would otherwise be conducted in accordance with the requirements of that Act, which include, for example, the right to submit evidence, to cross examine witnesses, to be heard by an impartial examiner, and to a decision based on the hearing record." (Emphasis added.)

We also note in this regard that the United States Court of Appeals for the Third Circuit has recognized that even where a statute requires hearings to be under the procedural requirements of the APA "there may be presiding officers other than those listed in § 7(a)[5 U.S.C. 556(b)], but that the procedural safeguards of the Act, and specifically the separation of functions safeguard of § 5(c)[5 U.S.C. 554], apply to such presiding officers to the same extent as to those presiding officers listed in § 7(a)[5 U.S.C. 556(b)]. *Twigger v. Schultz*, 484 F. 2d 856, 859 (3rd Cir. 1973)).

Although in your letter of October 12 you acknowledge the concurrence of the Assistant Attorney General with the view that the Commission should not be required to establish ALJ registers and to maintain supervision and control over title XVI hearing examiners, you indicate that the Commission should do so for policy reasons.

However, pertinent statutes and the Commission's regulations prohibit the establishment of ALJs on the basis of administrative or policy concerns. (5 U.S.C. 3105, 554; 5 CFR 930.203(c)). APA procedures and APA personnel requirements must be followed when required by some other statute. Insofar as APA personnel requirements are concerned, the definition of an ALJ position in the Commission's regulation is clearly in point. Specifically, section 930.203(c) defines an ALJ as a position in which any portion of the duties includes those which *require* the appointment of an ALJ under 5 U.S.C. 3105. Since the pertinent provisions of title XVI as explained by the legislative history cited above do not *require* the appointmet of an ALJ, the Commission is unable to comply with your request and the statement that the Commission could do so as a matter of policy in my letter of October 30, 1973, must be rescinded.

The possibility of reversal by a court about which you and Mr. Hess have made comment has been fully considered by the Commission. In commenting on the Supreme Court's language in the *Perales* case, (*Richardson* v. *Perales*, 404 U.S. 389, 410 (1971)), the General Counsel noted:

This language seems clearly to indicate that the Supreme Court feels that the requirements of due process do not demand the classic adversary-type hearing in social security disability hearings, (and I don't believe anyone would seriously contend that the present disability hearings are of this adversary nature). Instead, the Court only requires that these hearings be fundamentally, fair (*Richardson* v. *Perales, supra*, at 410). It is therefore unlikely that the Court would require more-highly adversary type hearings in the closely similar hearings which will be held under title XVI, i.e., hearings which would require section 3105 ALJs. A further practical consideration in this regard is the ninety day time limit for determinations in title XVI hearings imposed by subsection 16317(c)(2). Even under the present nonadversary disability proceedings, final determinations are seldom, if ever, reached in ninety days. To impose the adjudicatory formalities concommitant with more-highly adversary hearings before an ALJ would certainly make the ninety day limit unobtainble. Therefore, I do not feel that Congress contemplated, nor would the courts require, that the procedures accorded to the classic type of adversary hearings be accorded under title XVI.

Also with regard to the question of possible court reversal it has been suggested that the failure to completely adhere to the requirements of the APA (including the appointment of section 3105 ALJs) would deprive SSI claimants of "due process". It is our opinion that the failure to label SSI hearings as APA or to appoint ALJs to preside over these hearings does not, of itself, entail a denial of due process. Rather, what is contemplated by due process is that the hearings be fundamentally fair; and as Assistant Attorney General Dixon pointed out, (Pgs. 6–10), as a practical matter, the requirements of due process as enunciated in *Goldberg* (*Goldberg* v. *Kelley*, 397 U.S. 254) and as modified by *Perales* are very similar, at least in principle, to the requirements of the APA. Accordingly, the fact that a hearing is not, strictly speaking, an APA hearing or does not have as its presiding officer an ALJ, does not mean that a claimant is being denied his right to due process; and with regard to possible court reversal the Assistant Attorney General noted in his cover letter of October 5, 1973, "that there would be virtually no risk if at the outset HEW accorded these hearing examiners 'independence' closely approximating the 'independence' of existing SSA-disability examiners . . ."

With respect to the classification of the SSI positions you have indicated that the advisory opinion issued by the Commission's Bureau of Personnel Management Evaluation in August of 1973 will inhibit effective recruitment and eliminate the possibility of career advancement for the SSI hearing officer. On the basis of the information submitted by the Department last summer, the Commission was at that time unable to find that the subject positions could be classified at a grade level higher than GS–13. The Commission is fully cognizant that flexibility and mobility in the management of the SSI program are necessary and in view of these factors you are authorized to establish at the GS–14 level an appropriate number of supervisory hearing officer positions in order to achieve maximum effectiveness in the implementation of this program.

The Civil Service Commissioners are fully aware of your concern about the expeditious and effective implementation of the SSI program. In connection with this important undertaking and programs of a similar nature, many figures in the field of administrative law and a number of organizations concerned with the regulatory process have expressed concern about the plethora of statutory proposals and programs for which APA procedures and ALJ personnel requirements have been sought. These concerns are reflected in the study initiated earlier this year by the Commission dealing with the effective utilization of ALJs; they are also reflected in a further study just announced by the Chairman of the Administrative Conference of the United States aimed at establishing some principles and guidelines for identifying proceedings in which ALJs should be required. The Commission intends to cooperate fully in the study just announced by the Chairman of the Administrative Conference and expects that the Department will provide the Conference with the benefit of its extensive experience as the study proceeds. The Commission is hopeful that the recommendations to be made by the Utilization Committee and by the Administrative Conference will produce proposals for administrative action and legislation in the public interest.

As indicated in the letter to you dated October 30, 1973, the Commission is fully aware that the Department's needs are urgent and that a large number of SSI cases are expected in the latter part of March, 1974. As indicated in the letter dated October 30, 1973, the Department's utilization of the provisions of 5 CFR 930.209 should provide considerable relief in the handling of the SSI cases. This section of the regulations permits the Department to assign an ALJ to perform additional duties when the additional duties are not inconsistent with the responsibilities of an ALJ. On the basis of the information available to the Commission, the temporary assignment of the Department's GS-15 ALJs to hear cases arising under the SSI program would not be inconsistent with their regulatory assigned duties. The Commission is of the view that the provisions of this regulation will ameliorate some of the problems the Department may encounter beginning in March of 1974.

In summary, it is the Commission's opinion that the question as to whether ALJs should be provided to preside over SSI hearings must turn on the legal issue of whether these ALJs are in fact required by the pertinent legislation. After carefully considering the arguments, both pro and con, with respect to this issue, it is the Commission's conclusion that section 3105 ALJs are not required by the Social Security Act Amendment of 1972 to preside over SSI hearings, but rather that it is in the power of the Secretary under section 1631 (d)(2) to appoint individuals to fill these positions.

Accordingly, it would be inappropriate for the Commission to provide ALJs for these hearings.

By order of the Commission,

ROBERT E. HAMPTON, *Chairman.*

Mr. BURKE. Without objection, the statement made by Congressman Karth will be put in the record at this point.

[The statement follows:]

STATEMENT OF HON. JOSEPH E. KARTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. Chairman, one of the oldest axioms of the law and the legal profession tells us that "Justice delayed is justice denied."

That axiom, in terms of social and economic justice, is profoundly applicable to the question before us here today. The frequently long delays imposed on Social Security claimants, before they can have their rights adjudicated by hearing officers as required by the Social Security Law, is often cruel and harmful.

For economic justice to be delayed for weeks and even months for elderly and needy Americans is clearly justice denied.

In Minnesota and St. Paul we not only have had extensive experience with the hardships and even sufferings that result from hearing delays; we have also learned that the delays, in many if not most cases, are unnecessary.

The contention—that most Social Security hearing delays could be avoided—will be amply vertified, I believe, in numerous examples and case histories which I will present later in this statement.

To set the background for our experience in Minnesota—and I have every reason to believe it is typical of other states—I would like first to relate the experiences reported to me by the Association of Hearing Examiners. These Examiners are the men and women who preside over hearings of the Supplemental Security Income program, which is Title XVI of the Social Security Act.

The Association has written to me as follows:

"Briefly the situation is this: Hearing Examiners have been employed by the Social Security Administration for the purpose of hearing Supplemental Security Income cases only. It was presumed that there would be a huge inflow of such cases throughout the country. That did not materialize. As a result, there is virtually no backlog of cases, and certainly not in Minnesota.

"At the same time, however, there is a sizable backlog in hearing the Title II disability cases that results in a substantial delay in claimants obtaining a decision, by a year or more. Your constituents are helpless to receive an earlier decision because of this backlog."

The letter to me from the Association of Hearing Examiners continues.

"The simple fact is that Title XVI (SSI) disability cases are identical with Title II disability cases, but in addition SSI cases are frequently more complicated by the income and resources tests that are applied to those cases.

"Therefore it would be in the public interest for Congress to adopt the amendments proposed in the attached memorandum to place the Hearing Examiners in the same grade and responsibility as the Administrative Law Judges who, without exception, are far behind in the backlog of hearing requests. The relief from this undue burden for claimants could be provided by permitting these cases to be heard and decided by those who are now Hearing Examiners in SSI cases."

The Association's letter then points out that this was "substantially the intent of the Ways and Means Committee when they drafted Title XVI." The Committee chairman, the letter recalls, in response to inquiry on the Floor of the House, stated "unequivocally that these hearings would be conducted in accordance with section 3105, Title 5 U.S. Code, which provides for hearings to be in accordance with the Administrative Procedure Act." The Association's letter concludes:

"It is our considered opinion that this would be both more economical and much more efficient administration of the Social Security Law as enacted by Congress which has been amended from time to time. Without these amendments the backlog of Title II and Title XVIII requests for hearings will continue to increase in number beyond the present high level in Minnesota and totaling more than 100,000 cases nation wide. This problem holds for every state in the country. At the same time, Hearing Examiners in Title XVI will be without sufficient workload to fully utilize their time and abilities. Therefore, it would be a positive improvement if the Social Security Act was amended in line with the recommendations of our memorandum."

The memorandum and recommendations for Social Security Act amendments cited in the Association's letter are submitted by Morris H. Kross, President of SSI Hearing Examiners, and are as follows:

Proposed Amendments to Title XVI of the Social Security Act.

"We believe that Title XVI should be amended to provide that hearings with respect to claims arising under this title shall be conducted, on the record, and subject to Title 5 U.S. Code APA; and, further amended to provide that the Secretary shall hereafter appoint Administrative Law Judges to conduct such hearings in accordance with section 3105 Title 5 U.S. Code.

"Provision must be made for the current corps of SSI Hearing Examiners appointed by the Secretary. Some have suggested a savings clause which would permit the Hearing Examiners heretofore appointed to continue to do their work including holding hearings, until such time as they are qualified and appointed as Administrative Law Judges.

"However, the strong consensus is that, particularly in view of all the circumstances, Hearing Examiners, heretofore appointed by the Secretary under Title XVI, should be deemed to have been appointed as Administrative Law Judges, and be "grandfathered" in, to hold the same grade, title and position as the Administrative Law Judges to be hereafter appointed.

"It is felt that this amendment is needed because it will, first, insure the original intent of Congress that SSI hearings be conducted in accordance with and under the Administrative Procedures Act. SSI hearings are not now under the APA, as a result of a ruling by the Civil Service Commission. For detailed information, we note pages 55 through 75 of the Committee Staff Report on the Disability Insurance Program, dated July 1974.

"Even more importantly, APA hearings are needed to insure due process to claimants.

"In support of the enactment of a grandfather clause, we note that the whole situation and problem was created, in the first instance, by the refusal of the

Civil Service Commission to accede to the SSA request for establishment of ALJ registers for SSI Hearing Examiners. The Bureau of Hearings and Appeals, of necessity, had to establish a register from which to appoint SSI Hearing Examiners. Although they have been appointed at GS–13 level, the qualifying requirements for the register, are the same as those of the Civil Service Commission for Administrative Law Judge registers, except that not quite as much *length* of qualifying experience is required. The work being done by the Hearing Examiners (substantially all cases are disability claims) is the same as that of ALJ's in adjudication of Title II disability cases. Indeed, SSI hearings are sometimes even more complex and difficult because of the added income and resource issues.

"Under these crcumstances, it would appear that this is not an arbitrary classification of Hearing Examiners to Administrative Law Judges but that, in fact, both by reason of qualifying experience already established and the work already being done, there is a clear showing that the current Hearing Examiners have both the qualification and capacity to fill such Administrative Law Judge positions.

"While the corps of Hearing Examiners is needed to handle Title XVI hearings, they are not available to help the Bureau of Hearings and Appeals tackle and dispose of its tremendous backlog of Title II disability cases, because they are not now APA Examiners. For example, concurrent Title II/Title XVI disability cases constitute a significant portion of the BHA caseload now being heard only by ALJ's."

Before turning to a number of actual case histories in St. Paul and Minnesota—case histories which prove not only that delays are the rule rather than the exception but also that delays cause acute hardship—I want to make one clear exemption from my indictment.

Minnesota's Social Security staff people are as hard-working and conscientious a group of workers as I have ever known. In no way are they responsible for the pattern of delays and near-immobility we are considering here. That responsibility must rest with the system itself and with faulty procedures adopted by Social Security's Baltimore headquarters.

This is verified in part by the example of the Bureau of Hearings and Appeals in Minneapolis. Currently this office has four Administrative Law Judges with a backlog of cases amounting to an eight-month waiting list. Meanwhile, there are also two Hearing Examiners who process appeals from SSI decisions, but the work of these two Examiners is up-to-date and current.

But if an eight-month waiting period for a Social Security claimant is a horror story, that is only part of the horror. After waiting eight months for a hearing the claimant may very possibly face an additional waiting period until the Judge's decision is written and handed down. In one case reported to me it took the Judge a full six months after the hearing to produce his written decision. Meanwhile the two Hearing Examiners, who could be helping to dissolve the backlog, cannot assist on SS cases even though the criteria for deciding these SS cases are the same as with SSI cases.

The examples of delays that follow cut across most Social Security functions, including disability, tardy Old Age benefits, death benefits, medicare, computer errors and other problems.

Cruel and even brutal are the words for these delays, because, remember, the victims are almost always elderly people, often handicapped, frequently confined to their homes, sometimes ill and incapacitated. They are people living on the most meager incomes and while they are waiting for their eligibility or appeals to be acted upon they cannot, like other groups, go out and get an interim job or even part-time employment.

These elderly citizens are trapped, helpless victims of a ponderous and unfeeling bureaucratic machinery. They are at the complete mercy of an insensitive, slow-moving system that I'm afraid too often considers them as numbers rather than an human beings.

These are Americans who have spent their lifetimes in toil, contributing their energies and their brains to the building of our nation, to making America rich and powerful. Surely they deserve better from us, than "justice delayed," something better than agonizingly long waits for payments or for needed benefits.

America is not a heartless nation, but that would be hard to prove by our treatment of the aged and deprived.

It is no exaggeration to say that elderly Americans can suffer and die during their months-long wait for hearings, for decisions and finally for benefits.

The following case histories, all from St. Paul and Ramsey County, Minnesota, and only a few out of many, are of necessity capsulized, and being extremely condensed they do not, of course, reflect the tragic hardships and mental distress often caused by red-tape delays.

The case of Mr. B.G. He applied for disability benefits March 1, 1974, and his claim was denied two months later. He applied for reconsideration and went through the required appeals process. Today the case is still pending before the Appeals Council in Washington. *Waiting time and delay to date: 18 months.*

The case of Mr. S.J. He applied for disability benefits on January 17, 1973. Not until more than six months later was the application rejected. He went through the appeals process, but was finally turned down July 31, 1975. *Waiting time and delay: 30 months.*

The case of Ms. C.M. She applied for disability benefits sometime prior to January 29, 1974, when her application was denied. Hearing held by a Hearing Examiner six months after application. Case reviewed by Appeals Council November 21, 1974, and rejected February 3, 1975. *Waiting tilme and delay: 12 months.*

The case of Ms. B.L. She filed for disability benefits in August, 1973, and the application was rejected. She requested reconsideration, but not until January 10, 1975, was the reconsideration denied. *Waiting time and delay: 15 months.*

The case of Mr. W.E. He submitted a Medicare claim for a doctor's bill in April, 1974. The claim was not denied until November, 1974. On January 8, 1975, he requested a hearing and was told at that time that the office had a 10-month backlog. A hearing was finally held August 8, 1975, but to date no decision has been reported. *Waiting time and delay: 17 months and still pending.*

The case of Mr. M.F. He applied for disability benefits on January 3, 1974, and nearly three months later the application was denied. A hearing was held and a favorable decision was handed down March 17, 1975. *Waiting time and delay: 14 months.*

The case of Mr. M.C. This case was already at the appeals level in August, 1974. Applicant was told that the Hearings Board was six to eight months behind, that there were not enough judges, etc. Case still pending. *Waiting time and delay: 13 months.*

The case of Dr. A. The doctor submitted a $50 bill for treatment of a Medicare-covered patient in December, 1973. A check for less than half the amount was sent, lost and payment stopped. On August 7, 1975, she was advised by phone that there would be a continued delay in sending the check. *Waiting time and delay: 21 months.*

The case of Mr. W.R. He originally filed for disability benefits in 1968, was denied and refiled in March, 1974. Case has been kicked around from St. Paul to Baltimore and back to St. Paul. Claim denied and hearing requested. Hearing request still pending today. *Waiting time and delay: 17 months*

The case of Mr. T.D. Following his wife's death in December, 1974, Mr. T.D. applied for a lump sum death benefit. The benefit check was mailed June 14, 1975. *Waiting time and delay: six months.*

The case of Mr. G.A. He filed a disability claim which was denied on December 6, 1974. He requested reconsideration, was again denied, and filed for a hearing. He was advised that there would be at least a six-months wait. *Waiting time and delay: more than six months.*

The case of Ms. H.M. For five years she had been receiving Social Security payments under her deceased husband's account, and then suddenly three months ago the payments stopped. No one in Social Security could explain why.

The case of Ms. M.M. She applied for widow's benefits in November, 1974, visited Social Security offices five times. First check was not sent until five months later.

These are only a few of the hundreds of cases of red-tape delays, ranging up to an incredible two-and-one-half years, that have victimized my constituents in the last few years.

How serious is the problem of delay in the processing of Social Security payments and benefits?

Part of the answer is to be found in the current backlog statistics for Minnesota. At present there are 848 cases pending before the Bureau of Hearings and Appeals. That may not sound terribly serious until it is known that of those 848 cases 313 have been pending for six months or longer. And these six-month-old cases take on added significance when it is known that their number is constantly increasing, not decreasing.

If the St. Paul experience is typical then the national picture is appalling to contemplate. If St. Paul's backlog is typical—and I have no reason to doubt that it is—then there must be tens of thousands of claims and appeals piling up on desks and in filing cabinets waiting adjudication. And with the waiting periods growing longer instead of shorter.

The nation's Social Security system is one of the most necessary and invaluable functions of our Federal government. Millions of people depend upon it to preserve them from poverty, hunger and homelessness. Millions depend upon Social Security for medical and hospital care they could not otherwise afford.

And our economic system itself depends upon Social Security as one of the major bulwarks against a deepening recession, against social and economic collapse.

For those and other reasons Congress must do everything it can possibly do to strengthen Social Security, make it more efficient, and more readily accessible to the American people.

We can take a very large step in that direction by eliminating the delays which are responsible for so much heartbreaking hardship, suffering and distress.

Mr. BURKE. The committee is adjourned.

[Whereupon, at 12:11 p.m., the committee adjourned.]

DELAYS IN SOCIAL SECURITY APPEALS

FRIDAY, SEPTEMBER 26, 1975

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON SOCIAL SECURITY,
COMMITTEE ON WAYS AND MEANS,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2128, Rayburn House Office Building, Hon. James A. Burke (chairman of the subcommittee) presiding.

Mr. BURKE. Today we have a very distinguished panel to discuss some of the complex problems involved in the hearings crisis. We have private practitioners in administrative law, former Government administrators, public interest attorneys, and law school professors who specialize in this difficult area. Each of the panelists will have up to 10 minutes to summarize his statement.

I would like to introduce our panel in alphabetical order.

Ralph Abascal, Deputy Director, California Rural Legal Assistance, Sacramento, Calif., who has worked closely with State and Federal legislators in addition to his poverty law activities. He is an expert on appeals under the SSI program and is writing a manual on the subject.

Robert M. Ball, who is a senior scholar with the Institute of Medicine, is the proverbial "he needs no introduction." During his 30 years with the Social Security Administration—10 as Commissioner—the Ways and Means Committee was his second home.

Robert G. Dixon, professor of law, Washington University, has a broad career in teaching and government. He conducted a study of the social security disability and appeals procedure for the Administrative Conference, which he enlarged into a book. Following this, he served as Assistant Attorney General, Office of Legal Counsel, and was the author of the Justice Department opinion of the coverage of SSI under the APA.

Richard Keatinge is a private attorney who is a member of the Executive Council of the Administrative Law Section of the American Bar Association, which over the years has taken great interest in the issues now under discussion. However, he is testifying as an individual and not for the ABA.

Victor Rosenblum, professor of law at Northwestern University, is also a member of the ABA Administrative Law Section. He has just completed a major study for the Administrative Conference on the ALJ's, with special emphasis on the dispute over the SSI hearing examiners.

Wilson M. Matthews was Director of the Office of the Administrative Law Judges, Civil Service Commission, for many years prior to his retirement in 1971. Mr. Charles Dullea followed him in this position. Mr. Matthews, as a consultant to HEW, participated in drafting the regulations on the qualifications and organizational status of the SSI hearing examiners.

Edwin Yourman, former Assistant General Counsel of HEW for the social security program, has just finished a major study, under contract to the Social Security Administration, on beneficiary hearings, appeals, and judicial review.

A PANEL CONSISTING OF RALPH ABASCAL, DEPUTY DIRECTOR, CALIFORNIA RURAL LEGAL ASSISTANCE, SACRAMENTO, CALIF.; ROBERT M. BALL, NATIONAL ACADEMY OF SCIENCES, INSTITUTE OF MEDICINE, WASHINGTON, D.C.; ROBERT G. DIXON, JR., PROFESSOR OF LAW, WASHINGTON UNIVERSITY, ST. LOUIS, MO.; RICHARD KEATINGE, ATTORNEY, LOS ANGELES, CALIF.; VICTOR G. ROSENBLUM, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY, EVANSTON, ILL.; EDWIN YOURMAN, ATTORNEY, WASHINGTON, D.C.; AND WILSON M. MATTHEWS, ATTORNEY, ALEXANDRIA, VA.

Mr. BURKE. Gentlemen, we welcome you. I believe we will start off with Mr. Ralph Abascal.

STATEMENT OF RALPH ABASCAL

Mr. ABASCAL. Mr. Chairman and members, I want to thank you for convening this series of hearings today so that we may address ourselves to the problem of very substantial importance to 35 million people, over one-sixth of this Nation's population.

The problem, I believe, goes far deeper in the Social Security Administration than just the hearings backlog. This backlog is a symptom of a much deeper problem. My testimony will focus upon urging you to propose specific time limits in the application appeals process because such standards will force, I think like a catalyst, the adoption of more efficient procedures at deeper levels as well as causing expansion of personnel to meet such time limits.

I have a few brief comments on a few of the procedural reforms that have been proposed by others. Preliminarily, I will offer a brief comment on the issue of the applicability of the Administrative Procedure Act to the SSI program.

I think it is, indeed, unfortunate, that this issue of applicability to the APA has consumed so much energy and so much time of HEW, the Civil Service Commission, the Attorney General, the staff of this committee, its chairman, its members, and the witnesses in these hearings. It is unfortunate because it consumed so much energy and thought that should have been directed to the principal problem; that is, the backlog and delays in hearings and the consequences of that.

The issue has been decided incorrectly, I would suggest. I would agree with an analysis just recently published in an article in the Northwestern University Law Review, entitled "Social Security Hearings for the Disabled: Who Decides, Trial Examiners or Administrative Law Judges." I believe that an analysis of the statute and a review of its legislative history, as well as sound policy considerations, all point to the conclusion of applicability.

I think the only argument in opposition appears to be the egocentric concerns of the existing corps of non-HEW administrative law judges to assure that the prestige of their titles will not be tarnished by an expansion of their ranks.

The issue has been decided, and all Congress can do now is reaffirm its original intention, as is done in H.R. 8911, the bill recently reported to the full committee by the Public Assistance Subcommittee. This will not forestall the very real possibility that the decisions of SSI hearing examiners rendered prior to enactment of H.R. 8911 will be held invalid by the courts. However, prompt enactment of the measure would diminish the impact of such a ruling.

There is one aspect of H.R. 8911 that I believe is quite ill advised. The measure provides authority to the Secretary to appoint temporary hearing examiners until 1978. It appears from the bill such individuals would not be under the control of the Civil Service Commission. Thus, the degree of independence that they will have is much less than administrative law judges.

I think, in order to assure the reality and appearance of justice, that incorporation of 5 U.S.C. 5362 and 7521 into the provision in H.R. 8911 would achieve such independence, but I would defer to somebody more familiar with Civil Service Commission law. I think the important thing is to insure the greatest degree of independence.

The real problem right now, as well as for the past 15 years, that the administrative process from initial application to final adjudication consumes an inordinate and unconscionable amount of time. While the delay has been bad enough in the past, the data developed by the committee's staff reveals that it is now worse than it has ever been and if nothing is done now, it will get even worse.

I do not mean to be facetious or unduly macabre, but delay all too frequently means the "exhaustion of administrative remedies" and results in the attrition of the claimant. I think we should never lose sight of the fact that delayed payment of benefits for eligible claimants will very often cause considerable psychological anguish that contributes to the obvious and disastrous consequences to the claimants' abilty to survive.

If the individual is forced to work to survive, the disabling condition is often made worse, perhaps precluding the possibility of subsequent restoration of earning capacity. If the condition precludes work, and he or she has little or no income, as is always the case in SSI, the claimant is forced to live with whatever general assistance which may be available. That is the only alternative, an alternative that is often not too generous.

In my State, California, the amount of general assistance paid in several counties is a maximum of $2 per month. In San Francisco, a city where the cost of living is amongst the highest in the Nation, it is a generous $78.50 per month. I think that emphasizes the necessity of prompt action on appeals, particularly given the percentage of reversals that exist throughout the entire appeals process.

Professor Dixon, Mr. Yourman, and others have made several proposals to reduce the delay. Regardless of the details and relative merits of the proposals, the choices that Congress has break down into three basic alternatives: First, change the procedures so that the existing personnel can process applications and appeals faster; second, simplify existing rules, such as the definition of disability, or the various income of resource provisions of SSI, so that the frequency of erroneous decisions caused by complex rules are reduced; third, increase the number of appeals and applications personnel so that the processes will be speeded up.

None of these are mutually exclusive. Ideally, they should be done simultaneously. I would suggest one of the best ways to insure that we move toward that ideal with the greatest dispatch would be to do what Congress has never done, impose specific time limits on the applications and appeals processes.

For the past several years, the States have had imposed upon them specific time limits in the old public assistance programs which they operated. The experience there indicates that time limits can, in fact, speed up these processes.

In California, the court case that I participated in had a very catalytic effect in causing the agency to really use its imagination and creativity to achieve compliance. There was a very substantial reduction in the appeals' processing times.

The committee has before it a bill, H.R. 5276, which establishes specific time limits. Those limits are far too long. They are 90 days for initial determination, 90 days for reconsideration, 120 days for the administrative law judge hearing, and 120 days for appeals council review. That is, altogether, 420 days, or 14 months.

This is particularly difficult for SSI claimants where economic resources are minimal. Since the reversal rate is so high, effects at each level should be mobilized to insure that denials are corrected as soon as possible. In the past, as recently as June 1970, the entire process to the ALJ decision took 7½ months. H.R. 5276 would allow 10 months.

Such legislation should also provide that the appeals time limits would not apply to SSI claimants, so long as they were receiving presumptive eligibility payments. As long as they were receiving such payments, the time in which an application is processed is irrelevant.

Additionally, I think a self-enforcing mechanism has to be adopted to better insure that the time limits would be adhered to. H.R. 5276 contains such a mechanism, which I think could be improved upon as elaborated in my written testimony.

Finally, I think that the time limits in nondisability cases under both titles II and XVI should be shorter than those applicable in disability cases. For many years, the time limits imposed upon the States by HEW, where disability was not an issue, were 30 days for applications and 60 days for appeals. Certainly, the Social Security Administration, with its more extensive managerial and fiscal resources, ought to be able to adhere to the time limits HEW deemed necessary and possible in the State programs.

Several specific proposals to reduce the backlog have been suggested. I will just comment on two or three. First, the recent practice of remand to the State agency when an administrative law judge hearing is requested, in fact a re-reconsideration, I think, raises serious questions of propriety and wisdom.

I think it raises a problem endemic in the decisionmaking process; that is, the more layers that exist in the process, the more opportunity there is for people at lower levels to "pass the buck," to shift responsibility to those at a higher level.

Even before initiation of the new re-reconsideration procedure, there was all too much evidence of insufficient development of medical evidence to support a denial in the first two stages, initial determination and reconsideration. It seems that the operative principle is that any injustice caused by inattention or sloppiness will be caught at the next level because the "truly eligible" will appeal and the next level will correct the error. It should be obvious that the buck can only be passed to the next higher level if the claimant is persistent and does appeal.

Passive individuals will simply drop out somewhere along the line, even though they may indeed be "truly eligible." I think what all of this reduces to should be obvious. The principal focus should be on making correct decisions in the first place at the lowest level. That is the initial determination level.

Professor Dixon has made the point quite persuasively. To the extent initial decisionmaking is improved, the volume of appeals should diminish, and those that remain should be decided with more dispatch.

I have made other comments, but I believe because of the time considerations I do not want to elaborate upon those. They are in my written testimony, Mr. Chairman.

Mr. **Burke**. You may continue.

Mr. **Abascal**. There is a suggestion in Mr. Sisk's bill, H.R. 8018, that I heartily endorse. Presently, adverse notices of initial and reconsidered determinations merely paraphrase the statutory definition of disability. In short, the notice is purely conclusionary.

Neither the rejected claimant nor anyone who tries to assist him—be they attorney, paralegal, or friend—can tell precisely why the claimant was denied. So often a decision to appeal to higher authority is not an informed decision, it is merely a stab in the dark.

This failure to explain why, I think, is the height of mismanagement and injustice. Two consequences flow from a denial notice that fully explains why that particular claimant was denied.

First, it is likely that many decisions would be more acceptable to claimants. That is, no further appeal would be taken because he knew precisely why he was denied. Now, further appeal is often made, particularly by unrepresented claimants, which constitute 65 percent of all claimants, merely in the hope that someone at a higher level will explain the denial.

Second, a precise statement of the basis of the denial would permit the claimant to focus down to that precise basis at the next level in the process. Now, at each stage, the claimant or any representative must use the "shotgun" approach and prove all elements of eligibility. The requirement of precise notice should be imposed at both the initial determination and reconsideration levels. The very same consequences of adequate notice, I believe, would be operative at the initial determination level. Given the much larger number of initial determinations, the beneficial consequences would be all the more beneficial.

Additionally, I would strongly oppose Mr. Sisk's proposed section 205(b)(6). It would require the claimant to respond to a specific notice by making specific allegations of error in order to appeal to the next higher level in the appeals process. Failure to comply with this requirement would preclude the claimant's raising the unspecified issue later.

This is, the notice would be like a complaint of a plaintiff in court, and the claimant would have to respond with something similar to an answer. It is unsound policy. Sixty-five percent of all claimants are unrepresented and only approximately half of the represented, the 35 percent, are represented by attorneys. To impose what is nothing less than a pleading requirement on more than 80 percent of those who cannot meet it is of dubious merit.

I cannot shake from my mind the intuitive conclusion that the present system of initial determinations on applications by State agencies is one of the substantial causes of [illegible]als crisis. All of the arguments in favor of maintenance o[illegible]us quo are summarized by the staff's July 1974 report. All [illegible] be predicated upon inertia and political considerations.

I really think it undeniable there would be greater uniformity and faster processing time in a federalized system. Such consequences cannot help reduce appeals. Congress has waited for 16 years for the HEW report on this issue. A study was urged by GAO, in its 1959 study on this issue. Sixteen years is too long to wait. I think Congress should immediately appropriate funds for an objective analysis of this issue by a private contractor and respond promptly after the report is submitted.

Finally, in conclusion, I would suggest that withdrawing the protections of the Administrative Procedure Act is not the answer to the backlog in the appeals crisis. It is not those protections that are causing the problem. Something else is causing the volume of appeals. Diminishing the quality of justice available to one-sixth of this Nation's population will not diminish the quantity of justice.

Thank you, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF RALPH SANTIAGO ABASCAL, DEPUTY DIRECTOR, CALIFORNIA RURAL LEGAL ASSISTANCE, INC., SACRAMENTO, CALIF.

THE SOCIAL SECURITY ADMINISTRATION APPEALS PROCESS

Mr. Chairman and members, I want to thank you for convening this series of hearings and addressing yourselves to a problem of substantial importance to over 35 million people, over one-sixth of our nation's population.

The problem goes far deeper into SSA than just the hearings backlog; the backlog is merely a symptom of a deeper problem. My testimony today will focus upon urging you to propose specific time limits in the application and appeals process because such standards will force, like a catalyst, adoption of more efficient procedures at deeper levels as well as cause an expansion of personnel to meet the time limits. Additionally, I have a few brief comments on just a few of the specific procedural reforms that have been proposed. Preliminarily, I will offer a brief comment on the issue of the applicability of the APA to the SSI program.

1. Applicability of the Administrative Procedure Act to the SSI program

It is indeed unfortunate that the issue of the applicability of the APA to the SSI program has consumed so much energy and time of HEW, The Civil Service Commission, The Attorney General, the staff of this Committee, its Chairman and its members, and finally, the witnesses during the Committee's three days of hearings. It is unfortunate because it has consumed so much energy and thought that should be directed to the principal problem—the backlog of hearings and the consequent delay.

The issue has been decided incorrectly I would suggest. I would agree with the analysis put forward in a recent article, "Social Security Hearings for the Disabled—Who Decides: Trial Examiners or Administrative Law Judges," 69 Northwestern University Law Review 915 (1975) in favor of APA applicability. Textual analysis, a review of the legislative history as well as sound policy considerations that those who hear and decide disputes be as independent as possible from those who administer programs all point to the conclusion of applicability. The only argument in opposition appears to be the egocentric concerns of the existing corps of Administrative Law Judges who wanted to insure that the prestige of their title would not be tarnished by an expansion of their ranks. How this bears upon the primary interests—those of SSI claimants—escapes me.

Nevertheless, the issue has been decided. All that Congress can do now is to reaffirm its original intention, as is done in H.R. 8911, the bill recently reported to the full Ways and and Means Committee by the Public Assistance Subcommittee. This will not forestall the very real possibility that decisions of SSI Hearing Examiners, rendered prior to enactment of H.R. 8911, will be held invalid by the courts. However, prompt enactment of the measure will diminish the impact of such a ruling.

However, there is one aspect of H.R. 8911's solution that I believe is quite ill-advised. The measure provides an authority in the Secretary to appoint temporary hearing examiners through 1978. It appears from the bill that such individuals will be subject to the control of the Secretary in that their pay, promotion and tenure will be determined by the Secretary. Even though they are only temporary, every aspect of sound policy compels that they, like Administrative Law Judges, be independent of the Secretary so that both the reality and appearance of justice that is best assured by independence exists in all hearings. (See the Northwestern University Law Review article cited above for further details on this issue.) I believe that an incorporation of 5 U.S.C. §§ 5362 and 7521 into the provision in H.R. 8911 would achieve such independence but I would defer to someone more familiar with the law applicable to the Civil Service Commission.

2. *The Backlog and Delay*

The real problem right now, as well as for the past 15 years, is that the administrative process, from initial application to final adjudication, consumes an inordinate, unconscionable amount of time. While the delay has been bad enough in the past, data developed by the Committee's staff reveals that it is now worse than it has ever been. If nothing is done, *now*, it will get worse and worse.

I do not mean to be facetious or macabre but delay all too frequently means that "exhaustion of administrative remedies" results in the literal attrition of the claimant. We should never lose sight of the fact that delayed payment of benefits to *eligible* claimants will very often cause considerable psychological anguish that contributes to the obvious and disastrous consequences to the claimant's literal ability to survive. If the individual is forced to work to survive, the disabling condition is often made worse, perhaps precluding the possibility of rehabilitation and the restoration of earning capacity. If the condition precludes work, and he or she has little or no income (as is *always* the case when an SSI claimant is truly eligible), the claimant is forced to live on whatever General Assistance may be available. That is often none too generous. In my state, California, the amount paid in General Assistance is determined solely by each county. As a result, several counties pay a *maximum* of $2 per month; San Francisco, a city where the cost of living is amongst the highest in the nation, pays a generous $78.50 per month. In either case, delayed payment all too often has the direct result of accelerating death.

Professor Dixon, Mr. Yourman and others have offered many proposals to help reduce the delay. Many of those proposals merit adoption but most require further study. However, regardless of the details or the relative merits of the proposals, the choices before Congress are reduced to three basic alternatives:

1. Change existing appeals procedures so that the existing personnel can process the appeals faster;
2. Change and simplify existing rules, such as the definition of disability, or the various income and resource provisions in SSI, so that the frequency of erroneous initial decisions is reduced;
3. Increase the number of appeals personnel so that the number of appeals will be processed faster.

These are not mutually exclusive; ideally, they should all be done, simultaneously and immediately, but the ideal always escapes us.

I would suggest that one of the best ways to insure that we move toward that ideal with the greatest dispatch would be to do that which Congress has never done; impose specific time limits on the appeals process. During past several years, the states have had imposed upon them specific time limits regarding both the processing of initial applications and appeals in the aged, blind, disabled and AFDC programs. The experience in the states indicates that such time limits, aided by court injunctions, have reduced delay. In California, a court injunction compelling compliance with the federal time requirements had a very salutory catalytic effect. The pressure imposed by the court order caused the state agency to plumb the depths of its imagination and creativity to achieve compliance. The result was a very substantial reduction in processing times.

The Committee presently has before it H.R. 5276 by Mr. Seiberling, a measure which establishes specific time limits in the applications and appeals processes. The time limits imposed by H.R. 5276 (initial determination, 90 days, reconsideration, 90 days, ALJ hearing, 120 days, and Appeals Council review, 120 days, a total of 420 days—over 14 months!) however, are far too long, particularly for SSI claimants whose economic resources are, by definition, wholly inadequate. Since the reversal rate is so high at each level of the process, all possible resources should be milized to assure that the erroneous denials are corrected as soon as possible. It *is* possible. The state experience a well as earlier SSA experience clearly demonstrate the possibility. (As of June, 1970, initial determinations as well as reconsideration only took approximately 60 days each and hearings were disposed of 106 days, a total of 7½ months; H.R. 5276 would allow 10 months.) All that is needed is that the necessary resources be made available to make the possibility a reality.

Such legislation should also provide that the time limits would not apply to SSI claimants so long as they were receiving presumptive eligibility payments. (Additionally, the present statute which limits the Secretary's authority to make presumptive eligibility payments for only 90 days ought to be amended to eliminate that restriction.)

Additionally, a self-enforcing mechanism should be adopted to better assure that the time limits are adhered to. H.R. 5276 contains such a mechanism by providing that if a decision is not made within the specified periods, the claimant should be paid the benefits for which he or she is otherwise eligible. However, H.R. 5276 would make this operable only at the request of the claimant. To assure that the advantages of the provision are not lost because of ignorance, it should operate automatically. This can be done easily since the determination of the amount of benefits that the claimant will be entitled to is made soon after application in both the Title II and XVI programs. Such a mechanism is highly desirable for two reasons. First, in the absence of such a provision, the only means by which an individual could enforce the requirement would be by an expensive, time-consuming lawsuit in a Federal District Court. Most applicants could not afford that. Those that are eligible for legal aid could conceivably take such action but to do so would be to waste the time of attorneys on both sides as well as add further burdens to the federal judiciary. Second, since the payments made pursuant to such a provision could not be recovered as overpayments, a prudent sense of fiscal responsibility within HEW and OMB would spur the agency on to see that the time limits are fully adhered to.

Finally, time limits in non-disability cases under both Titles II and XVI should be much shorter than those applicable to disability cases. For years, the time limits imposed upon the states where disability was not an issue in the adult public assistance programs was 30 days for applications and 60 days for appeals. Certainly, the Social Security Administration, with its more extensive managerial and fiscal resources, ought to be able to adhere to the time limits which HEW deemed necessary, and possible, in the state programs.

3. Specific proposals to expedite decisions

a. Remand to The State Agency When an ALJ Hearing Is Requested

The Committee staff has raised several questions regarding the wisdom of the newly adopted re-reconsideration procedure. I share these concerns. Unfortunately, data is apparently not yet available so that these questions cannot be definitely answered.

However, there is one additional possibility that should be considered under such a procedure, a possibility that may well operate because of the existence of the reconsideration procedure itself. That possibility is that when an additional layer of decision making is introduced, those who make decisions at lower levels tend to assume a lesser sense of responsibility for their decisions. The reconsideration personnel, constantly pressed to speed up, can all too frequently "pass the buck" in the more difficult or time-consuming cases to the re-reconsideration level. I do not doubt that this exists to some degree even unconsciously. The same problem can, and probably does, exist at the next stage, the re-reconsideration level, with responsibility passed on to the ALJ. Even before initiation of the re-reconsideration procedure, there was all too much evidence of insufficient development of evidence to support a denial at the first two states, initial determination and reconsideration. It often seems that the operative principle is that any injustice caused by inattention or sloppiness will be caught at the next level because the "truly eligible" wil appea and the next level will correct the error.

Of course, as should be obvious, "the buck" can only be "passed" to a higher level if the claimant is of the persistent and aggressive class. Obviously, passive individuals or those with a low threshhold for acceptance of apparent futility will simply drop out somewhere along the line, even though they may indeed be "truly eligible." The fact that a substantial number of individuals who successfully seek reconsideration or and ALJ hearing are determined to be eligible based upon evidence developed by SSA, not by the claimant, only after reconsideration or a hearing is requested demonstrates two things: (1) The "buck" has been passed, either consciously or unconsciously; and, (2) some individuals who did not seek a higher level of review were eligible but were improperly denied.

What all of this reduces to is what should be obvious but is apparently often not recognized: the principal focus should be upon making correct decisions in the first place, that is, at the initial determination level. Professor Dixon has made the point quite persuasively—the more precise the standard of disability, in both the statute, the regulations, and more exemplary or precedental decisions, the more that evidence is fully developed at the initial determination state, the less likely that erroneous decisions will be made. To the extent that initial decision making is improved, the volume of appeals should diminish and those that remain can be decided with more dispatch.

b. Informing The Denied Claimant of The Basis of Denial

Presently, an adverse notice of initial determination and an adverse reconsideration decision merely paraphrase the statutory definition of disability, advising claimants that they do not meet the standard. It is, in short, wholly conclusionary. Neither the rejected claimant nor anyone who tries to assist, be they attorney, paralegal or a friend, can tell *why* the claimant was denied. So, a decision to appeal to higher authority is not at all an informed decision; it is merely a stab in the dark. This failure to explain why is the height of mismanagement and injustice. Two consequences would flow from a denial notice that actually explained why *that* claimant was denied. First, it is likely that in many instances the decision would be more acceptable; that is, that no further appeal would be taken. Now, further appeal is often made, particularly by unrepresented claimants, merely in hope that someone at a higher level will explain the denial to them. Secondly, a precise statement of the basis of denial will permit the claimant to focus down on the precise basis for denial at the next level in the process. Now, at each stage the claimant and any representative must use the shotgun approach and prove all elements of eligibility.

Mr. Sisk's bill, H.R. 8018, would amend § 205(b) to provide for such a notice of an adverse consideration. I am in full agreement with that suggestion but would urge upon the Committee my belief that the arguments in favor of such a provision are even stronger in the case of the initial determination notice; the requirement should be imposed at both levels. The same consequences of adequate notice should be operative at the initial detemrination level. That is, greater acceptability of the initial determination should reduce the requests for reconsideration. For those cases where reconsideration is requested, the sharper definition of the issues will mean that both the claimant and the reconsideration decision maker will concentrate their evidence gathering and review upon *the* principal issues.

On this same general issue, I would strongly oppose Mr. Sisk's proposed § 205(b)(6) which would require a claimant to make specific written allegations of error in his appeal to the next higher level in the appeals process. Failure to comply with this requirement of filing an "answer" to SSA's "complaint" would preclude the claimant's raising the unspecified issue later. A very similar requirement was found unconstitutional in *Goldberg* v. *Kelly*. More importantly, it is very unsound policy. Sixty-five percent of all claimants are unrepresented and only approximately half of the represented 35% are represented by attorneys. To impose what is nothing less than a pleading requirement on more than 80% of those who cannot really satisfy that requirement is of dubious merit.

c. Federalization of the Initial Determination Mechanism

I cannot shake the intuitive conclusion that the present system of initial determinations by the 50+ state agencies is one of the substantial causes of the "appeals crisis." All of the arguments in favor of the status quo, summarized by the staff in its monumental July, 1974 Report, all seem to be predicated upon inertia and political considerations. All of the arguments in favor of federalization seem to point to the benefit of claimants. I think it undeniable that there would be greater uniformity and faster processing times in a federalized system. Such consequences cannot help but reduce appeals. Congress has waited for 16 years for the HEW report on this issue urged upon the agency in 1959 GAO study. Congress should immediately appropriate funds for an objective analysis of this issue by a private contractor.

4. Conclusion

Withdrawing the protections of the APA from Social Security and SSI beneficiaries is not the answer because it is not those protections that are causing the problem. Something else is causing the volume of appeals. Diminishing the *quality* of justice available to one-sixth of the nation, and a most vulnerable one-sixth at that, will not diminish the *quantity* of justice demanded.

Mr. BURKE. Thank you very much.

We welcome Mr. Ball to the subcommittee. We look forward to your testimony because you have a great deal of expertise in this area. Problems in social security seem to have been developing quite a bit in recent years. We welcome you.

STATEMENT OF ROBERT M. BALL

Mr. BALL. Mr. Chairman, members of the committee, it is a pleasure to be here with the Ways and Means Committee again.

As you know, I am not a lawyer. I think I am the only one testifying this morning who is not. My testimony will emphasize the administrative side of the problems and particularly the need for urgent action to overcome the immediate backlog problem of some 107,000 cases.

I thought it might be helpful to the committee as background to remind you of a few key points about the disability process prior to the claim reaching an appeals stage. After all, 95 or 96 percent of the favorable decisions in the social security disability insurance program are made without reaching the hearing stage.

If we could raise that figure just to 97 or 98 percent, so that more of the favorable decisions that were ultimately going to be made were made at the initial level, the crisis in the appeals process would just disappear. It would greatly reduce the load.

Without demonstrating it, I think we can just take it for granted that the real appeals problem is in disability. The regular OASI program is not a problem, and the black lung program will be cleared up in a few months. It is the disability decision, both in SSI and in the contributory system, where the problem is and will continue to be.

The issue is, how can this volume be contained and still grant full and impartial hearing rights to the disability claimants?

I would like to focus on disability insurance. It is important to realize that this is undoubtedly the largest long-term disability insurance program in the world. Given the subjectivity that is involved in borderline determinations, any appeals system will run to large volume.

Our question is, does it have to be as big as it is? What we are dealing with is a program of 1¼ million applications or more a year in disability insurance, with 50,000 or so, around 4 or 5 percent, going to hearings.

Maybe this is the best that can be done, but I hope that every attempt will be made to increase the percentage of allowances that are made prior to hearing and reduce the percentage of cases to which claimants have to turn to the expensive and delaying hearing processes.

Now, what is the process that leads up to the hearing? From the very beginning, Social Security adopted what might be called a screening strategy so that the large number of cases that could be decided relatively easily could be handled quickly. The idea has been to pass through the screen those cases that can be allowed on reasonably objective medical evidence alone and then deal with the borderline troublesome cases with additional development and evidence.

What we have is a system where the levels of severity from a medical standpoint have been developed in considerable detail after consultation with medical groups across the country.

The agency has listed the impairments in the regulations for each major body system and combinations of body systems which are at a level where it is reasonable to assume that a person who is not currently performing substantial gainful activity is, in fact, not performing it because of these impairments. And the decision process can stop right there for those who have impairments at this level.

People with that level of severity should get paid quickly and as soon as that evidence on the medical side is developed.

On the other hand, if the level of severity falls way short of the level of medical severity established by regulation, again there is no problem, and the claim is easily disallowed. I would guess without precise figures that something over 80 percent of this huge volume of claims can be handled in this way and that the major problem that is involved both in reconsideration and then in the appeals process are those cases that fall somewhat below the medical standards. Then it is necessary to take into account the peculiar situation of the particular individual—his age, training, experience—in order to make a decision.

Can it be said that even though he doesn't meet the medical standards, is he still unable to engage in substantial gainful employment? It is these borderline cases that account for the 4 or 5 percent that eventually go to hearing.

Another key decision that was made at the beginning by the Social Security Administration, and has been continued since—in addition to this reliance on relatively objective medical standards for the great bulk of determinations—was that one would attempt to get medical evidence that determined the residual capacity of the individual and not rely very heavily on the opinion of physicians who had treated the individual. In order to obtain more objectivity and uniformity, what is wanted is medical evidence that goes to the question of what the residual capacity of the individuals is; the physician's opinion that this person is disabled or cannot work is not given very much weight in the initial stages.

I might say, Mr. Chairman, that it is not a simple matter to gather this medical evidence. It is only more simple than to gather the kind of evidence required for the borderline cases. It should be emphasized, perhaps, that in order to treat a disease, it is frequently not necessary to know what degree of residual capacity the individual has. The treatment may be exactly the same regardless of an assessment of the capacity of the individual to work or not, so that many physicians just do not have the kind of evidence that is necessary for a disability program, nor are they particularly interested in it.

But with the purchase of specialist examinations, which occur in about half the cases, and a continual working with the medical profession, I would say that medical evidence, though difficult, is not our major problem. The cases that can be decided either entirely or almost entirely on medical evidence, can be decided with considerable uniformity. But there is a considerable gray area where the individual undoubtedly has a severe handicap—but short of the screening standards—and where it is necessary to take into account personalized vocational characteristics.

In this gray area I don't think it should be surprising that since in the last analysis frequently what is required is a judgmental balancing of a variety of factors that initial adjudicators and hearing officers might come to different conclusions even on the same evidence. But, in fact, the way the process works, the evidence is seldom the same. By the time the claim has gotten to a hearing stage, there is almost always considerable additional evidence that has been developed, and the hearing is a de novo hearing on the basis of the condition of the individual at the time of hearing, which in many instances is a worse condition than the one that was originally adjudicated.

That is the general outline, in a very rough way, of the process. And as I say, the great majority of allowances are determined on initial adjudication or reconsideration. What is left is 4 or 5 percent which are decided favorably in the hearings and appeals process.

Yet we are dealing with large absolute numbers, and although that is a small percentage, it creates such a tremendous volume in absolute terms that the backlog of hearings and the length of time needed is completely unacceptable. On the action level it seems to me there are two stages for the committee to consider.

One is related to temporary expedients designed to get the current backlog under control as quickly as possible.

Second, a consideration of possible changes for the long run. I would hope that this committee would help the agency in relation to the steps needed to get the backlog under control quickly, and without waiting to resolve long-term issues. The Social Security Administration has testified to several things that they are doing to help with the backlog. I just want to pick out two or three to comment on quickly.

The committee could help the agency to meet the temporary situation by taking the legislative steps necessary to make all hearing officers and administrative law judges in social security able to hear all cases. There are now three types of hearing officers, as you know: Some restricted to black lung cases, some restricted to SSI cases, and the resulting inefficiencies growing out of the inability to use the whole group of hearing examiners well hardly needs a demonstration—perhaps just an example.

Limiting the hearing officers to hearing only SSI issues just makes for a ridiculous situation, because in about half the SSI cases, the disabled person is appealing both a disability insurance determination and an SSI disability determination.

Second, I would think that a remand approach ought to be used, perhaps selectively. There are some cases that go to a hearing and there is, indeed, new evidence that might make it possible to decide favorably without a hearing.

Also it seems to me that 6 months is too long to allow an individual to ask for reconsideration and another 6 months to ask for a hearing. It seems to me that 60 days for each step would be enough time for a claimant to decide on whether or not to proceed.

I have no evidence that this has actually affected the process, but it should be kept in mind that with a contingency fee the usual arrangement, there is a monetary incentive for a representative to delay. He gets 25 percent of the final award. I have made no study whether they do cause delay, but given human nature, it may be that the representatives are not always in a hurry.

Certainly there has to be additional recruitment of regular administrative law judges. I would favor whatever is necessary to get more people on the job. If that means temporary hearing officers, but those who could hear all cases, I would be glad to have them responsible to Civil Service to protect their independence. But more manpower altogether and what manpower there is available for all cases is a key part of any temporary solution.

For the long run—turning from this special, particularly bad situation, there have been others earlier—I believe the total disability process would be improved if the State disability units were to be made a part of the Federal Social Security Administration.

Having the whole process of initial adjudication and reconsideration under a single direct line operation would help make for more uniform and consistent determinations in the borderline area at the first stages of adjudication. And the staffing pattern could be more flexible since it wouldn't be necessary to staff according to State lines under a Federal determination system.

One illustration of that: It would be easier to staff for face-to-face discussions at the reconsideration level, which the Social Security Agency is now considering. But since most State disability determination agencies are located at just one central point, it is very difficult to work out a face-to-face discussion as long as you have the State system.

For the long run, too, I would certainly hope that in SSI, whatever the arrangement is, the status of the hearing officer and the quality of the work done would be at the same level as in the insurance program. It seems to me quite unacceptable to have a substantial difference in the grade level of hearing officers based on a program.

I can see the possibility of differences in grade based on the difficulty of cases, but not on the type of program, and SSI disability determinations are just as difficult as title II determinations. They have exactly the same statutory language.

Finally, Mr. Chairman, the committee, I am sure, will want to consider the effect of the Administrative Procedure Act on the ability of SSA to maintain reasonable uniformity and quality in hearing determinations and reasonable standards of productivity for the hearing officers. This has been a continuing issue.

My own view is that this is not the central problem, that a good process can be worked out and administered either under the Administrative Procedure Act or an agency process that would have to be very similar because of constitutional guarantees. This seems to me not the central issue.

The main task is to increase the percentage of favorable decisions made in the initial stages. Moving the present 95 or 96 percent figure of all favorable decisions, say, up to 98 percent, and keeping the hearing process for those cases that the prior process has found to be ineligible on the basis of a fully developed and up-to-date record.

Thank you very much, Mr. Chairman.

[The prepared statement follows:]

Statement of Robert M. Ball, Senior Scholar, Institute of Medicine, National Academy of Sciences

Mr. Chairman and members of the committee, my experience, as you know, is as a public administrator with many years of responsibility for the operation of the social security program. I am pleased to make myself available to the Committee for any help this experience might be in improving the social security hearings and appeals process. I am not a lawyer, and my testimony will emphasize the administrative side of the problem and the need for urgent action to overcome the immediate backlog of some 110,000 cases.

The Committee print prepared by the staff of the Subcommittee on Social Security, "Background Material on Social Security Hearings and Appeals," seems to me to be an excellent document so that there is little need to include general background material in an opening statement. I thought, however, it might be helpful to the Committee to remind you of a few key points in the disability process at the levels of adjudication that precede hearings and appeals. After all, 96% of the favorable decisions in the disability program are made without a hearing and if this figure could be raised to 97% or 98% the annual hearing load would be greatly reduced.

It is the on-going disability insurance program that creates the massive, continuing hearings and appeals load. The black lung program has resulted in a big one-time load, but that will be disposed of in a few months. A large proportion of appeals in the Supplemental Security Income program are also on the issue of disability and 60% of the SSI claimants are applying for payments supplementary to social security benefits. And, of course, the old-age and survivors part of social security and Medicare have never resulted in a large percentage of hearing requests. So the volume of hearings, over time, is the result largely of appeals from disability determinations.

The most important question is how can this volume be contained and still grant full and impartial hearing rights to disability claimants. Disability insurance under social security is undoubtedly the largest long term and total disability program in the world, and given the subjectivity involved in borderline determinations, any appeals system will run to a large volume. But does it have to be as big as it is?

What we are dealing with in this program is 1¼ million disability determinations a year, with 50,000, or 4% going to hearings. Maybe this is the best that can be done, but I hope not. I hope that every attempt will be made to increase the percentage of allowances that are made prior to hearing and reduce the percentage of cases in which claimants have to turn to the expensive and delaying hearing process.

Now what is the process that leads up to a hearing? From the very beginning of the disability program, social security has adopted what might be called a screening strategy to handle the great majority of cases in this huge program. The idea has been to pass through the screen the largest proportion of cases to be allowed—those that could be allowed on reasonably objective medical evidence alone, and then to deal with the borderline, troublesome cases in a different way.

On the basis of research, experience, and nationwide consultation with physician specialists, detailed "levels of severity" on a great variety of impairments were established and have been kept up to date. The "level of severity" in each case is such that it is reasonable to presume that a worker who has such an impairment and is not currently working (engaging in substantial, gainful employment as defined in regulation) is not working because he is *unable* to. More technically, the listing of impairments in the regulations list for each of the major body systems (and combinations of body systems) impairments which: (1) are of the level of severity deemed sufficient to preclude an individual from engaging in any gainful activity; and, (2) are expected to result in death, or to last for a continuous period of not less than 12 months.

The levels of severity are, to the extent possible, precisely stated in medical terms that can be demonstrated by objective findings. What is wanted from the physician is not his opinion as to whether someone is "disabled" or whether he "can work," but objective evidence about a condition. The great majority of cases—I would guess well over 80%—are determined on the basis of medical evidence, evidence which either supports a finding that the defined level of severity has been met to that the disability is way short of the standard and should be disallowed.

The major problems, then, arise in connection with the cases that do not meet the test of medical severity. If the impairments are very substantially below the standards set, there is again no problem; the case can be disallowed with confidence. The problems arise when the impairment does not quite meet the standard and the adjudicator must then consider whether in the individual case, taking into account the peculiar situation of the individual—his age, training, and experience—it might be said that in this case, even though he does not meet the medical standards, he is still unable to "engage in substantial, gainful employment." It is these borderline cases that account for the reconsiderations and the 4% of the million and a quarter initial applications that finally go to administrative law judges for decision.

As I suggested earlier, another key decision made at the beginning of the program was to set up an adjudicative process that collected medical evidence on the levels of severity from private physicians and other sources—both evidence submitted by the claimant and evidence bought by the Social Security Administration from specialists, as necessary—but left the determination of whether the evidence showed an "inability to engage in substantial, gainful activity" in the hands of adjudicators employed by the government. In other words, to give the program greater objectivity and uniformity, little reliance was put on the stated opinion of physicians that the worker could or could not work. Rather, reliance has been put on medical findings as to whether workers have this or that degree of incapacity.

It is not a simple matter, of course, to gather these medical findings. It is one thing to establish standards of severity for the regulations, and something else again to feel confident that one has good evidence supporting a finding that the level of severity in an individual case has been met. We are dealing here with both the problem related to the state of the science and art of diagnosis and prognosis in medicine and also the competence of individual physicians. And one thing we learned early in the disability program was that for the purpose of the treatment of a disease, it is frequently not necessary to establish a precise measurement of what damage the disease has done to an individual's capacity. The treatment may be the same without measuring remaining capacity. Thus, many physicians do not have records of, nor are they necessarily interested in, measuring levels of severity of a disabling illness. And, of course, the wide variation of competence among practicing physicians is well established. To improve the evidence, the program from the beginning has purchased examinations from selected specialists. For many years such evidence has been purchased in about half the cases.

Nevertheless, in spite of the difficulty sometimes of gathering convincing medical evidence, by far the most difficult cases are those that have to be decided on non-medical evidence. There is a substantial grey area where the individual unquestionably has a severe handicap—but short of the standard—and where it is necessary to take into account the kind of work he is trained to do, the possibility of his being rehabilitated and trained for other work, his age and other personal characteristics, the availability of the sort of work he can do, if any, and so on. In these borderline areas differences of opinion are substantial. A considerable body of precedents and adjudicative rules have been developed governing borderline cases, but in the last analysis many do require a judgmental balancing of a variety of factors, and it is not surprising that initial adjudicators may come to one conclusion and that a different conclusion is reached on appeal even if all the facts presented are the same.

But the evidence before the initial adjudicator and at the end of the appeals process is usually not the same. New evidence is very often submitted and, indeed, in many cases the condition of the claimant may have substantially deteriorated by the time of appeal. It should be noted that the hearing before the administrative law judge is a de novo hearing on the condition of the claimant at the time he appears.

Mr. Chairman and Members of the Committee, this is the general outline of the process in the disability insurance program. The great majority of allowances are determined on initial adjudication (over 84%) and the reconsideration process (over 11%). Thus, 96% of allowances are reached before hearings and appeals. Yet, we are dealing with very large numbers and in absolute terms there is a tremendous hearings load under present procedures, and the backlogs on hearings and the length of time to get a hearing is completely unacceptable.

It seems to me that there are two levels of action that need to be taken. One, temporary expedients designed to get the backlogs under control, and two, the consideratioon of possible changes for the long run. I would hope that this Committee could help the agency in relation to the steps needed to get the backlog under control quickly and without waiting to resolve long-range issues. One hundred and ten thousand cases in the backlog may be a relatively small percentage of the millions of claims filed each year under the disability insurance program, the old-age and survivors insurance program, the black lung program, and the new SSI program, but, nevertheless, the waiting time is causing great injustice for the individuals involved and is, of course, having a negative effect on the public's perception of the administration of social security.

The Social Security Administration is doing several things to help with the backlogs as pointed out in the staff document. I think this Committee could help meet the temporary situation by:

(1) Taking the legislative steps necessary to make all hearing officers and administrative law judges in social security able to hear all cases, at least on a temporary basis. As the staff document points out, there are now three types of hearing officers in Social Security: a. the administrative law judge for title II cases; b. administrative law judges qualified only to hear black lung cases, and c. special hearing officers who are not under the Administrative Procedures Act and can hear only SSI cases. These distinctions result in very inefficient use of hearing officers and ought to be changed. The backlog problem for the black lung cases should be solved within the next three months and these experienced hearing officers should be used on the disability backlog of regular cases. Limiting hearing officers to hearing only SSI issues makes for a ridiculous situation, since in about half the cases the disabled person is appealing both a disability insurance determination and an SSI determination.

(2) I would think the remand approach ought to be used on all cases that go to hearing if there is indeed new evidence that might make it possible to pay the case without a hearing. It also seems to me that six months is too long to allow an individual to ask for reconsideration and another six months to ask for a hearing. It seems to me that 60 days for each step would be enough time for a claimant to decide on whether or not to proceed. It should be kept in mind that representatives of claimants have something of a stake in drawing out the process since their contingent fee is 25% of the payment finally made, and the longer the retroactive payment builds up the more the representative gets.

(3) There should be additional recruitment of regular administrative law judges. They will be needed in the long run, I would guess, no matter what is done, but if necessary, temporary hearings officers with authority to hear all cases should be appointed.

These are the steps that I would emphasize for the immediate job of getting the backlog under control. I hope they would have Committee support and legislative action where needed.

For the long run, I believe the total disability process would be improved if the State disability units were to be made a part of the Federal Social Security Administration. Having the whole process of initial adjudication and reconsideration under a single direct line operation would help make for more uniform and consistent determinations in borderline cases at the first stage of adjudication. Also, the staffing pattern could be more flexible since it would not be necessary to staff according to state lines. Under a federal determination system, it would be easier to staff for face-to-face discussions between claimant and agency at the reconsideration level, a process that, I believe, would result in fewer formal hearings. Now many state agencies are located in just one place in a state and find the face-to-face interview difficult, if not impossible to arrange.

For the long run, too, I would hope that hearings in SSI would be afforded the same status as insurance hearings. It seems to me quite unacceptable to have a substantial difference in the grade level of hearing officers based on the program. I can see the possibility of differences in grade based on the difficulty of cases, but not on the type of program. SSI disability determinations are just as difficult as title II disability determinations.

Finally, Mr. Chairman, the Committee, I am sure, will want to consider the effect of the Administrative Procedures Act on the ability of the Social Security Administration to maintain reasonable uniformity and quality in hearing determinations and reasonable standards of productivity of the hearing officers. However, my own view would be that coverage under the Administrative Procedures Act is not the major problem, and that a good process can be worked out either under the Administrative Procedures Act or not. The main task is to increase the percentage of favorable decisions made at the initial stages—moving the present 96% figures up to say 98%, and keep the hearing process for those cases that the reconsideration process has found to be ineligible on the basis of a fully developed up-to-date record.

Mr. BURKE. Thank you.

Professor Dixon, we will hear from you.

STATEMENT OF ROBERT G. DIXON, JR.

Mr. DIXON Thank you, Mr. Chairman.

I am pleased to be here and especially pleased to have had the good fortune to find a taxicab to get here in time through the current monsoon weather in Washington.

Mr. Chairman, this panel has before it one of the truly pressing problems of our times: The problem of claims adjudication in an emerging welfare state. The social security disability program, which is a particular focus of these hearings, and whose 440 administrative law judges constitute more than half of the total ALJ corps, is not only important and troublesome in its own right, but is a sort of prototype.

We have already added the supplemental security income program, and the black lung program. To date we have not cast the vast Veterans' Administration claims programs in the formal hearing model of the SSA disability program. I am not now suggesting that we should do so, but certainly we should have some understanding, other than mere historical development, as to why we adopt different models for the function of benefits claims determination common to all of these programs.

There is a need for Congress to give more attention to the significant differences between the adjudication of benefit claims, where the intake numbers millions per year, and the older and more familiar process of regulatory administration exemplified by the Interstate Commerce Commission and later independent commissions. Our perceptions of the administrative process, of administrative law, and of the proper content of Administrative Procedure Act have been drawn almost exclusively from the leisurely, low-volume, high-visability, rich-litigant world of regulatory administration.

I develop that further in my full statement. I would like to conclude on this point by saying that the whole area of benefit claims adjudication and the potential sharp distinction from regulatory administration, and its offshoot, the Administrative Procedure Act, merit more attention than it has received. To discuss only the status of the hearing officer and the appeal procedure in the SSA disability program would be to treat the symptoms and not the disease.

A key aspect of our problem is the problem of the clarity—or the lack of clarity in the basic decisional standard in the disability program. This lack of clarity also affects the new SSI program, in its aspects of disability, because the standard is the same.

As we all know, Congress in 1935 authorized a program the public knows simply as social security based on payroll deductions, matching contributions, and the like. It is keyed to an age eligibility factor which has been modified somewhat.

In 1956 Congress added the disability program under a statutory standard of disability so uncertain in its application to peripheral fact situations that it is capable of producing serious inconsistency and overpayment. This was not the intent.

At first blush the purpose was laudable and the statute reasonably well drafted. Congress said in effect, we have authorized a retirement program, keyed to attaining a certain age, but some unfortunate people, because of acts of God in the form of mental or physical defects, are forced out of the pool of employables despite their best efforts to stay in. These, in effect, become involuntary, premature retirees, and as such should have the statutory retirement age waived so that they can begin to receive "retirement money" right away as "totally disabled." But it was to be a premature retirement program, and not a substitute for unemployment problems, general welfare needs, and the like.

The congressional phrasing of the standard to achieve this purpose is as follows:

> An individual * * * shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and previous work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions in the country * * *.

The version I have just quoted is the amended version as of 1968. The amendment was needed because the first onslaught on the restricted raison d'être for the program came from the judiciary. When face to face with a plaintiff, who by definition was unemployed and also had traumas of various sort, the courts melted and tended to convert the program into an unemployment compensation program, despite the fact that the congressional intent was total unemployability, not mere current unemployed status.

The Social Security Administration, very commendably, has developed a detailed set of medical listings in an attempt to create an objective set of standards under which the great bulk of claims can and are granted or denied without recourse to an SSA administrative law judge. But critical uncertainty in the standard continues in respect to those claimants who cannot qualify the easy way under the medical listings.

The resultant discretion possessed by the ALJ, plus the fact that ALJ's now reverse administrative denials in almost half of their decisions, brought the total number of claimant requests for an ALJ hearing, approximately 85 percent being disability, up from approximately 14,000 in 1960 to almost 53,000 in 1971.

Now, with SSI added, the total number of hearing requests projected for fiscal year 1975 is 154,945, of which approximately 75,000 are from the old SSA disability program under the 1956 statute.

As a generalization, it can be said that most of the claimants denied by the SSA system of initial review on the record are not disabled in any ultimate, bedridden sense. If one attends the hearings, one finds that the persons who get to the ALJ level, the hearing level, tend to be what might be called the "walking wounded." They have many traumas. They are not employed, and the elusive question is whether or not they are still theoretically employable, whether or not an actual job exists for them.

When we come to the hearing stage, the primary variables influencing the decision of the administrative law judge are not simply the medical factors which are the primary basis for the administrative process in Baltimore at the initial consideration and reconsideration stages. Rather, the important variables include delicate assessments of the education of the applicant, residual skills, transferability, downshifting to a more simple position.

Of special importance are the offhand comments at the hearing of the medical expert. At this level the medical expert does not examine the applicant. He views him in the hearing room context and looks at the paper record. The medical examiner can be quite sympathetic. He is not a lawyer. He is not versed in the statutory standards. He can make a statement which almost controls the final outcome of the hearing officer.

Also quite important are the comments of the vocational adviser at the hearing. This can be good or bad in terms of precision. Sometimes the comments are so abstract as to be inane, hauling out the dictionary of occupational titles, talking about the various weightlifting capacities certain jobs require, and so on. This could be improved, I think.

The crucial factor is that the standard is so broad that all these things can happen. My present impression is that the hearing examiners are now placing more and more stress on making more precise decisions, and are going beyond the dictionary of occupational titles. They are trying to get current evidence on the regional job market. This is laudable.

Because the standard isn't all that precise, there may be some tendency, in the stress on vocational factors, to increase the danger of making this into an unemployment compensation program, because no job exists out there for the man, rather than to follow the basic statutory concept of unemployability in the theoretical context.

The problem of discretion flowing from the standards also gives rise, I believe, to a rather important problem of inconsistency among individual administrative law judges in their rate of reversal of prior administrative denials of a claim.

Appendix 1 of my statement is a Xerox of a chart from my book, which in turn comes from the Bureau of Hearings and Appeals. This chart is about 3 years old. I think it is somewhat provocative. Of the total number of SSA disability hearings who worked all year in 1971—there were 252 on the chart plus another 11 whose rates were more extreme—of that number, the individual reversal rate of those ALJ's were so distributed that the reversal rate of 42 percent of them fell outside a 20-percnt spread centered on the national median. In other words, 110 of the total of 263 hearing examiners either consistently reverse at the rate of 56 percent of their cases or higher, or consistently reverse only at the rate of 36 percent or lower.

Other causes than vagueness of the statutory standard may contribute to these very disturbing figures on inconsistency of action by the ALJ's. There are two primary devices for narrowing and clarifying broad administrative discretion: (1) Rulemaking, and (2) case precedent derived from well-reasoned reported opinions and the stare decisis principle. Neither of these factors operate in the SSA disability program, nor for that matter in the new SSI program. There are no published opinions because of a policy of confidentiality designed to protect the claimant's privacy interest in respect to his personal problems and particularly his medical records.

There is no broad-gaged rulemaking process apart from the medical listings, but these are designed for the guidance of those who make the initial determination on the basis of the file, and do not bind the ALJ's. Hence, the SSA-Baltimore administrators who make the initial determinations, and ALJ's who review them, march to the beat of a different drum.

I think I mentioned earlier that the reversal rate is running around 45 percent.

Let me summarize briefly now some suggestions for improvement and then give an overall conclusion of what I think is our problem here.

I would suggest that we put great stress on attempts to clarify the disability standards by statutory procedures. After that we should attempt to engage in a process of rulemaking by the Secretary, perhaps under a congressional mandate to attempt a rulemaking. That would be appropriate.

I suggested earlier in my book that we might consider reconstituting the administrative level of reconsideration into a face-to-face hearing and federalizing it. That is also mentioned in my statement.

In broad summary, I would like to revert to the question of whether or not we need to make a broad reassessment of the distinction between claims adjudication and the procedures relevant thereto, and the regulatory processes and the process relevant thereto. It seems to me we need a fresh approach in this developing era of mass justice.

A tendency to expand the coverage of the old Administrative Procedure Act is not the answer. Let me quote from a recent talk of Judge Friendly of the second circuit:

> As government impinges more and more upon the citizen and the citizen demands more and more from the government, our traditional system of adversary administrative hearings and full-scale judicial review has become unworkable. If we persist in it, the country will become ungovernable. Yet we cannot abandon it without devising substitutes that will assure the citizen, not of perfection, but of reasonable fairness.

In an article published this summer, Judge Friendly surveys the Supreme Court's recent cases on administrative hearings such as *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and the successor cases which seem to limit the range of due process-required full hearings, and which he favors; for example, *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Torres* v. *N.Y. State Dept. of Labor*, 410 U.S. 971 (1973). He concludes: "While I applaud the Court's basic initiatives with respect to administrative hearings, the time for some new thinking and also for some tidying up has arrived."

Similarly, I would say that it is time for the Congress, with all the aid it can muster, to rise above the traditional piecemeal approach to welfare benefit determinations, and applications of the Administrative Procedure Act, and grade assignments for hearing officers, and engage in "new thinking" and "tidying up."

[The prepared statement follows:]

STATEMENT OF ROBERT G. DIXON, JR., DANIEL NOYES KIRBY PROFESSOR OF LAW, SCHOOL OF LAW, WASHINGTON UNIVERSITY, ST. LOUIS, MO.

This panel has before it one of the truly pressing problems of our times: the problem of claims adjudication in an emerging welfare state. The Social Security Disability program, which is a particular focus of these hearings (and whose 440 Administrative Law Judges constitute more than half of the total ALJ corps), is not only important and troublesome in its own right, but is a sort of prototype. We have already added the Supplemental Security Income program, and the Black Lung program. To date we have not cast the vast Veterans Administration claims programs in the formal hearing model of the SSA–Disability program. I am not now suggesting that we should do so, but certainly we should have some understanding, other than mere historical development, as to why we adopt different models for the function of benefits claims determination common to all of these programs.

There is a need for Congress to give more attention to the significant differences between the adjudication of *benefit claims*, where the intake numbers millions per year, and the older and more familiar process of *regulatory* administration exemplified by the Interstate Commerce Commission and alter independent commissions. Our perceptions of the administrative process, of administrative law, and of the proper content of Administrative Procedure Act have been drawn almost exclusively from the leisurely, low-volume, high visibility, rich-litigant world of regulatory administration.

We have all heard the expression: "You get the justice you pay for." The unspoken premise is that in a properly organized society there would be enough resources to pay for all the justice desired. Only when pushed as we are being pushed, I suggest, in the rapidly expanding field of claims adjudication, do we begrudgingly face the question: how nearly judicial should administrative claims determination be? Is it feasible to give every one of the millions of claimants annually in the programs I have mentioned an attorney, a full evidentiary hearing, an administrative appeal, and court review? Indeed, is it necessary, in order to achieve an acceptable level of accuracy and consistency in treatment of similar claimants? An even more serious question is whether such high formality *does* achieve the virtues of accuracy and consistency among claimants? The answer is *no*, according to some provocative evidence I gathered for my book, *Social Security Disability and Mass Justice: A Problem in Welfare Adjudication* (Praeger, 1973).[1] Hereafter cited as Social *Security Disability.*)

And yet, despite the problems and doubts suggested by this series of questions, I feel that it is the high-formality model developed for regulatory administration, and sanctified by the Administrative Procedure Act, which many feel to be part of the American birthright for all benefit program claimants against the government. I number here the American Bar Association, the so-called Public Interest Group firms, and private-client-oriented lawyers generally. I too, have a thirst for perfection. But resources of both time and talent are not in infinite supply.

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[1] For condensed version see "The Welfare State and Mass Justice: A Warning from the Social Security Disability Program," 1972 *Duke Law Journal* 681.

In short, the whole area of benefit claims adjudication, and the potential sharp distinction of it from regulatory administration and its off-shoot the Administrative Procedure Act, merits more attention than it has ever received. To discuss only the status of the hearing officer, and the appeal procedure in the SSA–Disability program, would be to treat the symptoms and not the disease.

THE PROBLEM OF STANDARDS

A problem preliminary to a discussion of the hearing procedures in the SSA–Disability program, and also the new SSI program (especially in its disability aspects), is the problem of clarity in the authorizing congressional statute. As we all know, the Congress in 1935 authorized a program the public know simply as "social security," based on payroll deductions and matching contributions from "employers" (the latter being passed along to the consumer, of course, as part of the real cost of the work force). The worker gets it back, and more, when he reaches retirement age, as a pension in the form of a monthly federal check. I follow the Brookings Institution in refusing to call this "insurance," because there is no significant relation between input and benefit, even though the official name for the program is Old Age and Survivors Insurance.

In 1956 Congress added the Disability Program under a statutory standard of disability so uncertain in its application to peripheral fact situations that it is capable of producing serious inconsistency and over payment. This was not the intent. At first blush the purpose was laudible and the statute reasonably well-drafted. Congress said in effect, we have authorized a retirement program, keyed to attaining a certain age, but some unfortunate people, because of acts of God in the form of mental or physical defects are forced out of the pool of employables despite their best efforts to stay in. These in effect become involuntary, premature retirees, and as such should have the statutory retirement age waived so that they can begin to receive "retirement money" right away, as "totally disabled." But, it was to be a premature *retirement* program, and not a substitute for unemployment problems, general welfare needs, and the like.

The congressional phrasing of the standard to achieve this purpose is as follows:

> [A]n individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and previous work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions in the country. . . .

The version I have just quoted is the amended version as of 1968. The amendment was needed because the first onslaught on the restricted raison d'etre for the program came from the judiciary. When face to face with a plaintiff, who by definition was unemployed and also had traumas of various sorts, the courts melted and tended to convert the program into an unemployment compensation program, despite the fact that the congressional intent was total unemployability, not mere current unemployed status. (See *Social Security Disability*, Chap. 6).

The more important problem in the program, still continuing, is that the congressional standard has proven to be so unworkable in a sufficient number of cases (albeit a small percentage of total *claims*) as to produce a major hearing officer and appeals problem. (See *Social Security Disability*, Chap. 4).

The Social Security Administration, very commendably, has developed a detailed set of medical listings in an attempt to create an objective set of standards under which the great bulk of claims can and are granted or denied without recourse to an SAA administrative law judge. But critical uncertainty in the standard continues in respect to those claimants who cannot qualify the easy way under the medical listings. The resultant discretion possessed by the ALJ, plus the fact that ALJ's now reverse administrative denials in almost half of their decisions, brought the total number of claimant requests for an ALJ hearing, approximately 85% being disability, up from approximately 14,000 in 1960 to almost 53,000 in 1971. Now, with SSI added, the total number of hearing requests projected for Fiscal Year 1975 is 154,945, of which approximately 75,000 are from the old SSA-Disability program under the 1956 statute.

As a generalization it can be said that most of the claimants denied by the SSA system of initial review on the record (which does include live physical examination, however), are not disabled in any ultimate, bedridden sense. Under the medical listings, for example, the loss of two legs may entitle one to total premature retirement, even if he is capable of remaining quite active. Once the claimant pool has thus undergone a double scrutiny on the paper record by experienced administrators at SSA-Baltimore with the aid of the state agency teams (Initial Consideration and Reconsideration on request), the claimants who get to the critical stage of a hearing before an SAA administrative law judge are the "walking wounded."

DETERMINING WHICH OF THE "WALKING WOUNDED" ARE DISABLED IN THE STATUTORY SENSE: STANDARDS AND OTHER FACTORS—ALJ HEARING

At this Administrative Law Judge stage the primary variables are those nonmedical factors which really determine whether the claimant, whose physical-mental traumas are not enough to get him an automatic "premature total retirement," should nevertheless be classified as totally unfit for any gainful employment in the national economy. Bear in mind the test is not inability to hold one's prior job, but inability to meet the requirements of any gainful employment, even if this would require considerable downgrading on the social and economic scale.

Important variables, not listed necessarily in order of importance, include (1) education and/or skill (*e.g.*, a seriously crippled person might be able to run a telephone-answering service, especially if educated); (2) personal drive and pride; (3) the off-hand comments at the hearing of the medical expert based only on the paper record and the claimant's demeanor in the hearing rooms; (4) the comments, sometimes bordering on the inane, of the vocaitonal expert who very abstractly tries to relate the claimant's residual skills to the "world of work" perceived as a series of weight-lifting contests; (5) the unspoken and perhaps not consciously recognized biases of the Administrative Law Judge; (6) the fact that *all* of the cases are applicant appeals from administrative denials, so that the Administrative Law Judge must reverse (find for the applicant) in a certain percentage of cases in order to preserve his self-respect and raison d'etre; (7) the crucial fact that in the "borderline" cases in which the ALJ's specialize the statutory standard is a nonstandard.

Next to clarification of the statutory standard, improvement in the vocational data may merit special stress, although this may increase the danger that the "total disability" concept will sub silentio become a "not locally employable" concept. I have the feeling that this already is occurring, and may explain the high rate at which ALJ's, abetted by the U.S. District Court judges, find for the applicant and reverse prior administrative denials. There may even be an incipient equal protection of the laws problem insofar as the statute allows regionalization of disability. Given two applicants with equivalent traumas and desire to retire early, why should one living in an area relatively barren of easy or light work receive his life-time full pension and the other, living in a different kind of area, be denied?

I found that attending some hearings was very instructive. The ALJ's are earnest and conscientious. But under our present system I fear we are asking too much of them, because of the subtleties of the statutory standard, not clarified either by precedent or rulemaking. The hearings are short, and the record is not voluminous by comparison to regulatory administration. The hearings are not productive of faith in the capacity of a hearing process alone to fill a clarity gap in the standard to be applied to peripheral fact situations. (See *Social Security Disability*, Chap. 5, pp. 84–92).

In addition to the problem of abstract "correctness" of an ALJ decision, there is the critical question of *inconsistency* among individual ALJ's in their rates of reversal of prior administrative denials of a claim. (See Appendix I to this statement which reproduces page 78 of *Social Security Disability*). Figures gathered by the Bureau of Hearings and Appeals of SSA indicate the reversal rates of individual hearing examiners (since re-labelled as Administrative Law Judges) vary widely. Of the total number of SSA-Disability hearing examiners who worked all year in 1971, (the 252 on the Chart plus 11 whose rates were more extreme), the individual reversal rates of 42% of them fell outside a 20% spread centered on the national median. In other words, 110 of the total of 263 hearing examiners either consistently reversed at the rate of 56% of their cases or higher, or consistently reversed only at the rate of 36% or lower.

Other causes than vagueness of the statutory standard may contribute to these very disturbing figures on inconsistency of action by the ALJ's. There are two primary devices for narrowing and clarifying broad administrative discretion: (1) rulemaking and (2) case precedent derived from well-reasoned reported opinions and the stare decisis principle. Neither of these factors operate in the SSA-Disability program, nor for that matter in the new SSI program. There are no published opinions because of a policy of confidentiality designed to protect the claimant's privacy interest in respect to his personal problems and particularly his medical records. There is no broad-gauged rulemaking process apart from the medical listings, but these are designed for the guidance of those who make the initial determination on the basis of the file, and do not bind the ALJ's. Hence the SSS-Baltimore administrators who make the initial determinations, and ALJ's who review them, march to the beat of a different drum.

One device for clarifying disability claims policy which does exist is the practice of the SSA Commissioner in issuing occasional "rulings." There is an Appeals Council with power to review ALJ determinations—the last stop before District Court review. A commissioner "Ruling" is simply an especially noteworthy Appeals Council case decision, "sanitized" and generalized to protect confidentiality, and issued as a policy declaration. There are few Rulings. This practice therefore is neither a case precedent system operating openly, nor a full rulemaking system. Functionally, it might be dubbed "Selective Adjudicatory Rulemaking."

SUGGESTIONS FOR IMPROVEMENT: MACROCOSMIC

In respect to improvement or overhaul of the SSA-Disability system and the developing, parallel, SSI Program, one can think in macrocosmic or microcosmic terms. Speaking macrocosmically, many of the problems of program volume, uncertainty of standard, resultant inconsistency of determinations by individual ALJ's, seem so intractable as to be discouraging.

A major procedural problem not yet mentioned is the "three-hat" role of the hearing officer at the SSA or SSI hearing: counsel for claimant (because a minority have their own co[illegible]unsel to represent the agency position; and judge. The question of "independence" of the hearing officer arises at this point. On the "independence [illegible]so many persons miss the key point. Only if standard is first clarified, and the hearing is recast as an adversary hearing of the conventional Administrative Procedure Act type, with a special spokesman present to represent the public interest against the claimant, should we consider making the SSA or SSI hearing officers more "independent" than they already are.

Indeed, because they are always mandated to consider new evidence, one of their roles is not to be a hearing officer reviewing a record, but simply to be the last step in an administrative process. On this basis they grant a claim not because the prior administrative determination was "wrong" under the law and facts it was based on, but because it becomes "incomplete" as soon as new facts come in.

In macrocosmic perspective then, given all the problems of standards and procedures summarized above and more, one can raise the question whether a better or even morally-edifying approach would be to terminate the SSA-Disability program, along with many other welfare programs, and find a substitute. We are all familiar with the guaranteed annual wage concept, now re-packaged under the more beguiling term of "negative income tax." It is not now politically feasible, and I am not proposing it. But the strongest case for it is the intractable nature of the problems in our existing varied welfare programs, particularly the SSA-Disability program, and the new SSI program.

In more realistic vein, I strongly urge the Committee to authorize a staff study of the question whether what I have called "claims adjudication" is sufficiently distinct from "regulatory administration" to require fresh approaches, unimpeded by the precepts embodied in the Administrative Procedure Act and the independent hearing examiner movement.

SUGGESTIONS FOR IMPROVEMENT: MICROCOSMIC

1. The most critical problem in the SSA-Disability program, and the SSI program, is the ineluctable, almost non-administrable quality of the basic standard set forth in statute. If the statute cannot or will not be clarified, a conscious effort should be made to encourage the Secretary of HEW, or the Commissioner of Social Security, to do more rulemaking—or at least try to do more rulemaking. The power of rulemaking must, of course, be kept within the responsible political process, and should not be vested in any independent or quasi-independent body within SSA such as the Appeals Council. (See on this point, and for general suggestions, *Social Security Disability*, Chap. 9, pp. 138–160).

2. Next to the problem of standards, an earlier face-to-face confrontation between the claimant and some responsible official with decisional or at least recommending power was strongly recommended in my study three years ago. The Reconsideration stage was suggested as the appropriate stage and it was proposed that it be federalized so that a potentially final national decision would result. It was suggested that not only the interest in personalizing government-citizen relations would be served, but that the personal contact might be relevant in achieving a better evaluation of the claim. The personal contact factor may explain why the SSA hearing officers have so frequently reversed the prior denials of claims made by officials relying solely on the record.

I have been informed that SSA has been doing this on an experimental basis in 17 states, using non-federalized state agency teams. I am also told that this experiment with face-to-face contact at the Reconsideration stage has resulted in more claims being allowed. This can be good, if the reason is better factual development. It can be detrimental to the concept of "total disability" which underlies the disability awards under both SSA and SSI if the increased inclination to grant the claim is simply a sympathetic reaction by persons not adequately trained in the special "total disability" concept.

This development should be watched. *If* it became an agreed success, then consideration should be given to structuring the Reconsideration stage so that a minimum reviewable record would be made, abolishing the present ALJ stage, and retaining the Appeal Counsel as the final buffer before court review.

The basic principle in mass claims adjudication should be to get personal contact at the lowest level feasible, a final decision at the lowest level possible, and grant court review not as of right but only on showing a major error.

3. If our system is to remain substantially unchanged, there are two areas that should receive major attention, and be pressed more vigorously than at present. One is the matter of *follow-up on* persons granted total disability to see if the physical basis for total disability has continued. The other is *vocational rehabilitation.*

In regard to follow-up, a fresh employment record will naturally trigger a review of the total disability award, but more regularized and automatic reviews may be needed. Just a few days ago I heard of the case of a woman who wished to be a governess but also wished to have the wages concealed, because she was drawing total disability. A prior heart condition had led to her award, very expensive medicine enabled her to rejoin society, but she needed money above her award to stay afloat. In this kind of situation our disability program is cockeyed. The program is based on an all-or-nothing concept—total disability or no award—whereas what this woman needed was a money grant for medicine and recognized employability status, not total disability.

In regard to vocation rehabilitation, so that the disabled can rejoin the work force, which likewise tends to be a forgotten corner of the total program, a study a few years ago suggested a change in emphasis. The study found that the state agencies to whom the vocational rehabilitation work is referred tended to focus on the most severely disabled, where sympathy runs high but prospect of re-employability is low. It was suggested that higher social dividends might result from re-focusing the vocational rehabilitation program on the disabled who are only marginally employable.

4. The problem of inconsistency among the hearing officers, mentioned above, needs very careful monitoring. It might be well to run consistency checks frequently, and to develop a regular audit procedure to see if factors other than chance are operating.

CONCLUSION

I conclude as I began. The handling of benefits and awards to millions of people is a feature of the welfare state unknown to past generations, and not well-handled simply by applying the highly-formalized procedures of the ICC and other regulatory agencies. We need a fresh approach both to procedure and to concepts of basic fairness in this development era of mass justice. A tendency simply to expand the coverage of the old Administrative Procedure Act is not the answer.

In the words of Judge Henry J. Friendly of the Second Circuit:

"As government impinges more and more upon the citizen and the citizen demands more and more from the government, our traditional system of adversary administrative hearings and full-scale judicial review has become unworkable. If we persist in it, the country will become ungovernable. Yet we cannot abandon it without devising substitutes that will assure the citizens, not of perfection, but of reasonable fairness."

[Address to Maryland Bar Association, 1974; quotes p. 52 of May 5, 1975 Memorandum of Association of Administrative Law Judges titled "Crisis in the Disability Insurance Program."]

In an article published this summer Judge Friendly surveys the Supreme Court's recent cases on administrative hearings such as *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and the successor cases which seem to limit the range of due process-required full hearings, and which he favors, *e.g.*, *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Torres* v. *N.Y. State Dept. of Labor*, 410 U.S. 971 (1973). He concludes:

"While I applaud the Court's basic initiatives with respect to administrative hearings, the time for some new thinking and also for some tidying up has arrived."

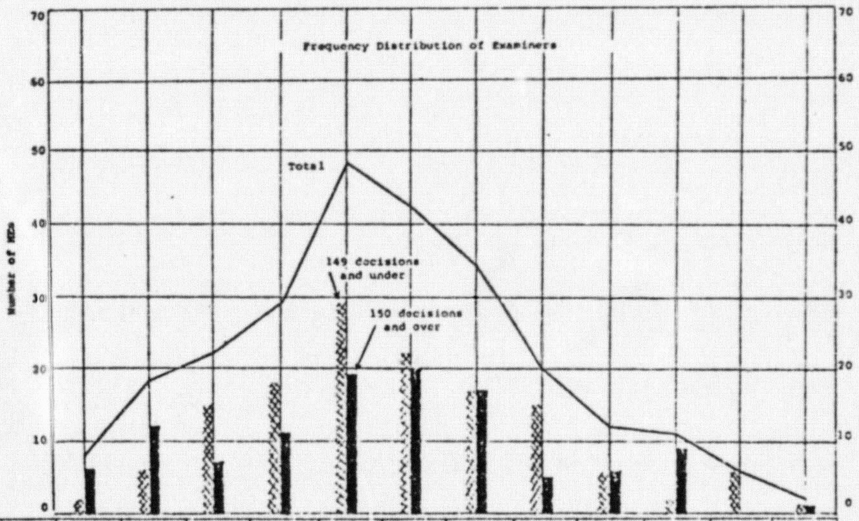
[Friendly, "Some kind of Hearing," 123 *U. Pa. L. Rev.* 1267, 1317 (1975)]

Similarly, I would say that it is time for the Congress, with all the aid it can muster, to rise above the traditional piecemeal approach to welfare benefit determinations, and applications of the Administrative Procedure Act, and grade assignments for hearing officers, and engage in "new thinking" and "tidying up."

APPENDIX I

[From Dixon, "Social Security Disability and Mass Justice" (1973), p. 78]

CHART 1.—Comparative hearing examiner reversal rate, BHA, fiscal year 1971



Percent Reversal*		21-25	26-30	31-35	36-40	41-45	46-50	51-55	56-60	61-65	66-70	71-75	76-80
Number of Hearing Examiners	149 decisions and under ▨	2	6	15	18	29	22	17	15	6	2	6	1
	150 decisions and over ■	6	12	7	11	19	20	17	5	6	9	0	1
	Total	8	18	22	29	48	42	34	20	12	11	6	2

*R ÷ (A + R) = Percent Reversal

Mr. BURKE. Thank you, Professor Dixon.

Our next panelist is Mr. Keatinge.

STATEMENT OF RICHARD KEATINGE

Mr. KEATINGE. Thank you, Mr. Chairman.

I appreciate the opportunity of appearing before the subcommittee this morning. The topics I have addressed are somewhat different than the topics addressed by the previous speakers, since I do not purport to be an expert on social security law. My practice is primarily limited to civil litigation and civil administrative law proceedings before what might be called the old-line agencies.

I have, however, been active in the affairs of the Administrative Law Section of the American Bar Association for a period of 15 years, and I have had an opportunity during this period of observing and listening to arguments with respect to the desirability of applying the Administrative Procedure Act to proceedings of various types, including the social security proceedings of the type we are discussing this morning.

The first point I have made in my prepared paper is that the Supreme Court's decision in *Goldberg* v. *Kelly* announces certain basic constitutional minimums for the conduct of social security hearings, but does not constitutionally require the application of APA procedures or identical procedures to such hearings.

I think this point is perfectly clear not only from *Goldberg*, but from the cases which have followed *Goldberg*. It seems to me the real question the committee faces in this area, though, is: As a matter of public policy, should the APA apply to all social security appeal hearings, including supplemental security income hearings?

This subcommittee and the Committee on Ways and Means should, I believe, report out favorably legislation which would insure the application of the APA to all social security hearings. This result would clarify a now muddled picture as to what is the congressional intent and the statutory mandate with regard to the APA's applicability to SSI hearings.

I will not discuss at this time the material in my prepared statement dealing with *Goldberg* v. *Kelly*. I think this subject has been adequately developed not only in my paper, but in the staff's lengthy and excellent digest of the problem.

I would prefer to address the question of whether or not the APA should be applied to all social security hearings.

I believe that Congress should declare that the provisions of the APA apply to all social security hearings. As this subcommittee staff has told you in its background material for these hearings:

> It is in the area of the qualification of the hearing officer and his relationship to the agency adjudicating the claim that the APA imposes requirements which are unique from those the courts have thus far stated are required by due process.

It may be appropriate to have ALJ's hearing social security matters, who do not meet certain of the requirements otherwise mandated for other ALJ's. This exception, of course, is currently provided for in the 1972 amendments to the Social Security Act establishing the SSI program, which allow the Secretary of HEW to appoint persons not meeting certain such requirements. This result appears to carry out the congressional intent, determined, I am sure, after full and careful consideration.

It may well be that the demands upon an ALJ in a social security determination hearing so differ from the demands upon ALJ's in other situations that such an exception to the standards applied in connection with the selection of other ALJ's is justified. I am sure that the subcommittee can consider this matter with all the factual information available to it and reach an informed conclusion as to the manner, if any, in which such selection standards should be modified. Similarly, I assume that grade and compensation distinctions based upon differences in function can be reviewed to see if modifications thereof are appropriate in this area. I am aware that Congressman Sisk has introduced a bill, H.R. 8018, which would eliminate the distinctions between ALJ's in the social security area and other administrative fields.

I basically believe in the appointment of ALJ's to hear social security matters. Since I am firmly of the opinion that a truly "neutral and detached" officer should determine the results of first level appeals in the welfare system, I have, in turn, been led to the conclusion that ALJ's should hear social security matters.

The APA is the best vehicle yet devised, in an administrative setting, to insure a "neutral and detached" hearing. It should be made quite clear, therefore, that the APA's requirements for Civil Service Commission control over the appointment and promotion of ALJ's should apply to all social security ALJ's.

The APA was carefully designed to insure the independence of the ALJ from the agency in which he operates. It gave to the Civil Service Commission, rather than to the agency, the control of the ALJ's pay, promotion, and tenure. While this independence is being achieved with respect to ALJ's involved in the regular SSA hearings, it is not, regrettably, being achieved with respect to the hearing officers involved in SSI hearings.

As the members know from the background information provided by the staff, a 13-month-long dispute between HEW and the Civil Service Commission ended with the Secretary's reluctant acceptance of the Civil Service Commission's legal argument that the APA does not apply to SSI hearings. The result is a corps of Secretary-appointed hearing examiners rather than ALJ's.

These Secretary-appointed examiners operate under a system in which: (1) They are to be appointed only with the Secretary's prior approval; (2) their work is to be reviewed by the agency to determine whether it is of "an acceptable level of competence"; (3) they may be promoted by the Secretary; (4) the Secretary may withhold in-grade pay increases; and (5) examiner removal is in the hands of the Secretary's appointees.

There are two basic things wrong with this procedure. First, if an examiner is human, there must always be a doubt as to his independence and to the impartiality of his decisions. Second, whether or not he is, in fact, independent, he will not appear to others to be independent.

I know personally that the administrative law section of the ABA fought for a very long time, and I am sure will continue to fight, for the complete independence of the hearing officer or ALJ from the agency in which he operates. The reason is that no matter who he is, a person whose present and future financial and job security is in the hands of the people or agency he is judging can never be sure he is making an independent judgment.

Whether we like it or not, career bureaucrats, and I use that term only descriptively, as do all of us, develop preferences and biases, and sometimes very fixed opinions, about the way things should be. That is why we should have the traditional "neutral and detached" officers to make decisions in appealed cases.

As was noted above, and as indicated by the Supreme Court in *Goldberg*, welfare, along with other forms of Government entitlement, is a reality of our modern society. Our way of life, urbanized, specialized, and technological as it is, almost guarantees that there will be some who cannot survive at an acceptable level without aid.

Our urban society is a long way from 40 acres and a mule. Welfare is a cost we must pay for making ourselves dependent upon each other by diminishing individual survival capabilities through urbanization and the other accomplishments of the division of technological and human labor.

Thus it is that the Supreme Court can find a "property" right in statutory welfare entitlements. Surely it is, therefore, not too much for us to act to insure that the millions of Americans who have such entitlement under welfare, social security and SSI provisions have the procedural safeguards equal to those afforded corporations pursuing their property rights, be they a TV license or a freight rate adjustment or whatever.

The second objection to the present procedure is the lack of an appearance of neutrality. For many, the interactions with the social security apparatus is one of a very few direct contacts with their Government.

I might add that other than a traffic court hearing, it is probably the only contact many citizens will have with their Government. In an era such as this, I surely need not emphasize the need for the appearance of fairness and propriety in Government. To a recipient or claimant fighting a termination or rejection in front of a decisionmaker who is not truly independent, that appearance is lacking.

I am aware that responsible voices argue that welfare programs are different from other programs in which ALJ's function, and that we are inappropriately "overjudicializing" the welfare system. Perhaps, however, "judicialization" is the price for fairness. But I note and take encouragement from those, such as my friend Prof. Victor Rosenblum, who have correctly stated, in effect, that the APA is not a judicializing straightjacket. Section 556(d) of the APA provides, in part:

> In rulemaking or determining claims for money or benefits or applications for initial licenses, an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

I would like to see that section interpreted creatively by the agencies, the ALJ's, and, when necessary, the courts. Although *Goldberg*, among other cases, requires an oral hearing as a requirement of due process it is probable, especially with the current composition of the Court, that abridged procedures undertaken with the voluntary, knowing, and intelligent consent of all parties, could pass constitutional muster, and if so, thereby aid in cutting down this backlog, and preventing others. The *Eldridge* case, of course, will help provide some answers in this area; that case is presently before the Supreme Court and will be heard sometime this fall.

As to the backlog in the SSA, I suggest that the subcommittee direct its attention to the administrative areas discussed by Commissioner Cardwell last Friday, by the subcommittee staff in its background materials to these hearings, by the "Staff Survey of State Dis-

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ability Agencies Under Social Security and SSI Programs," dated August 1, 1975, and by the earlier report on the disability insurance program prepared by the staff of the Committee on Ways and Means, dated July 1974. In addition, I am sure there are other relevant documents with which I, as a social security outsider, have less familiarity.

These administrative areas—the screening of pending disability appeals, informal remands, early face-to-face interviews, reduction of reconsideration and appeal request time, better staff assistance for ALJ's, removal of ALJ's from nonjudicial functions, elimination or reduction of mandatory reconsideration—should all be given careful consideration. Their use should have at least some effect on the backlog.

But I have not yet been shown how placing the decisionmaker under the APA will worsen the backlog. Indeed, I believe Commissioner Cardwell's testimony last week could be read to mean that the differentiation resulting in the use of administrative law judges for some cases and hearing examiners for SSI hearings is making the backlog worse by causing underutilization of the administrative law judges.

I have reviewed the current state of the law on the question of whether the APA applies to SSI hearings. Without restating all the legislative and administrative history a function the staff can, and no doubt has performed for you—I have concluded that there is indeed doubt as to what the courts would hold if the question of the APA's applicability to SSI hearings were to be presented. There are respectable and reasonable legal grounds for going either way.

However, I cannot believe that Congress intended such an ambiguity. Rather, as Chairman Ullman, and Chairman Mills before him, and the original House report have all stated, the congressional intention was to have the APA apply to SSI hearings, at least as to the control, pay, and promotion of those who preside at such hearings.

I, therefore, urge this subcommittee, the Committee on Ways and Means, and ultimately the Congress, to resolve this dilemma by enacting mandatory language which leaves no doubt that it is the intent of Congress that those who have a claim to SSI and other welfare benefits shall have their appeals to adverse determinations heard by a truly neutral and detached officer—an administrative law judge acting under the provisions of the Administrative Procedure Act.

Thank you, Mr. Chairman. I shall be happy to answer any questions.

[The prepared statement follows:]

STATEMENT OF RICHARD H. KEATINGE,[1] LOS ANGELES, CALIF.

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before the subcommittee this morning. Pursuant to the request of Chief Counsel Martin, my statement is directed to (1) the ramifications of *Goldberg* v. *Kelly*[2] for the Social Security appeals process, and (2) the advantages and disadvantages of having the Administrative Procedure Act ("APA")[3] apply to Social Security cases.

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[1] Mr. Keatinge is a senior partner of the Los Angeles law firm of Keatinge, Libott, Bates & Pastor, and is admitted to the Bars of the District of Columbia, State of New York, State of California and the United States Supreme Court. Among other things, Mr. Keatinge is a former member and Chairman of the California Law Revision Commission, a former Special Assistant Attorney General for the State of California, a former Chairman of the American Bar Association's Administrative Law Section, and currently that Section's Delegate to the American Bar Association's House of Delegates.

[2] 397 U.S. 254, 25 L. Ed. 2d 857 (1970).

[3] 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 5362 and 7521 (1971).

I have concluded that:

(1) *Goldberg* v. *Kelley* announces basic constitutional minimums for the conduct of Social Security hearings, but does *not* constitutionally require the application of APA procedures or identical procedures to such hearings.

(2) As a matter of public policy, the APA, at least with regard to the supervision and promotion of Administrative Law Judges (ALJs), should apply to *all* Social Security appeals, including Supplemental Security Income ("SSI") hearings. This subcommittee and the Committee of Ways and Means should, I believe, report out favorably legislation which would insure this result, thus clarifying the now muddied picture as to what is the Congressional intent and the statutory mandate with regard to the APA's applicability to SSI hearings.

(1) RAMIFICATIONS OF GOLDBERG V. KELLY

The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be deprived by either the federal or state governments "of life, liberty, or property, without due process of law." In *Goldberg*, the Supreme Court stated that "[t]he extent to which procedural due process must be afforded the [welfare] recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'."[4] But, in *Morrissey* v. *Brewer*, a case dealing with the extent of due process required in connection with a parole revocation, the Court stressed that *whether* due process is required depends heavily on the *nature* of the interest threatened, and announced that

> The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment.[5]

In *Goldberg*, the Court stated that the "grievous loss" test is satisfied when a welfare recipient is threatened with termination of his benefits when he is thought to be ineligible; this results because

> . . . termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.[6]

Welfare benefits also satisfy the "property" test. Although in his dissent in *Goldberg* Justice Black had criticized the majority's treatment of welfare benefits as a property right,[7] in a footnote to the majority opinion, Justice Brennan took notice of a reality which I trust this subcommittee will keep in mind as it considers these issues. Having observed that welfare benefits are a matter of statutory entitlement, the Court states:

> It may be realistic today to regard welfare entitlements as more like "property" then a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long-term contracts for defense, space and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced."[8]

The matter hopefully was further clarified by the Court in *Board of Regents* v. *Roth*. In discussing whether due process should apply to a state college's nonrenewal of a non-tenured faculty member's one-year contract, the Court distinguished the situation then before it to the situation in *Goldberg*. The Court acknowledged that the statutory entitlement to benefits, even though the "recipients *had not yet shown that they were, in fact, within the statutory terms*

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[4] *Goldberg* v. *Kelly*, 397 U.S. at 262–63, 25 L. Ed. 2d at 296.

[5] *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 33 L. Ed. 484, 494 (1972).

[6] *Goldberg* v. *Kelly*, 297 U.S. at 264, 25 L. Ed. 2d at 297.

[7] *Id.*, 397 U.S. at 275, 25 L. Ed. 2d at 303.

[8] *Id.*, 397 U.S. at 262, n. 8, 25 L. Ed. 2d at 295, n. 8. The quotation is from *Reich*, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale Law J. 1245, 1255 (1965).

of eligibility," amounted to a property interest protected by the due process clauses [emphasis added].[9]

Goldberg v. *Kelly* announced procedural rights constitutionally reqiured for those under threat of welfare benefit termination. The Court has continuously reminded us that the "process which is due" will differ from situation to situation. However, given the emphasized language from *Board of Regents* v. *Roth*, above, combined with *Goldberg, Morrissey* and the other cases decided prior to the January 1, 1974 effective date for SSI benefits,[10] I conclude that similar requirements would likely be held applicable to the denial of SSI benefits.

Goldberg requires that prior to the termination of welfare benefits:

1. Timely and adequate notice of a pretermination hearing must be given, and the notice must include the reasons for the proposed termination;
2. The recipient must be afforded an opportunity to defend against the proproposed termination by (a) confronting and cross-examining any adverse witnesses at such hearing; (b) orally presenting evidence and arguing his case; (c) having the aid of his own lawyer, if the welfare recipient so desires;
3. The rendering of a decision must be made by an impartial decision-maker; and
4. The impartial decision-maker's decision as to a recipient's eligibility must rest solely on the legal rules and the evidence adduced at the hearing, and his opinion must, therefore, state the reasons for his decision, indicating the evidence upon which he relied.[11]

The Court stated in *Goldberg*, however, that the hearing need not take the form of a judicial or quasi-judicial trial,[12] and that

> . . . prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.[13]

This latter point was later addressed in *Morrissey*, when the Court stated that *Goldberg* did *not* require the traditional "neutral and detached" officer: "it required only that the hearing be conducted by some person *other* than one initially dealing with the case." [14]

Thus, although there are similarities, the Court has not established constitutional standards as complete and rigorous as those embodied in the APA and the cases construing it. The Court's restraint here evidences wisdom, implying an understanding of the respective roles of the Court and the Constitution on the one hand, and Congress and statutory law on the other. It is nevertheless equally clear that it is proper for the Congress to decide what, if any, procedural safeguards should apply beyond these due process minimums.

(2) *The Application of the APA to Social Security Hearings:*

I believe that Congress should declare that the provisions of the APA apply to *all* Social Security hearings. As this subcommitteee staff has told you in its Background Material on the hearings:

"It is in the area of the qualification of the hearing officer and his relationship to the agency adjudicating the claim that the APA imposes requirements which are unique from those the courts have thus far stated are required by due process." [15]

It may be appropriate to have ALJs hearing Social Security matters who do not meet certain of the requirements otherwise mandated for other ALJs; this, of course, is currently provided for in the 1972 amendments to the Social Security Act establishing the SSI program,[16] which allow the Secretary of HEW to appoint persons not meeting certain such requirements.[17] This result appears to carry out the Congressional intent,[18] determined, I am sure, after full and careful consideration.

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[9] *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561 (1972).

[10] See, for example, *Eldridge* v. *Weinberger*, 361 F. Supp. 520 (W. Dist. Va. 1973), aff'd 493 F. 2d 1230 (4th Cir. 1974), and cases cited therein, in which termination of disability benefits was held as "grievous" a loss as the termination of welfare benefits. The Supreme Court has granted *certiorari* in this case, 419 U.S. 1104, 42 L. Ed. 2d 800, and oral arguments will be heard, probably in November, under the name *Matthews* v. *Eldridge*.

[11] *Goldberg* v. *Kelly*, 397 U.S. at 268–71, 25 L. Ed. 2d 299–301.

[12] *Id.*, 397 U.S. at 268, 25 L. Ed. 2d at 298.

[13] *Id.*, 397 U.S. at 271, 25 L. Ed. 2d at 301.

[14] *Morrissey* v. *Brewer*, 408 U.S. at 486, 33 L. Ed. 2d at 497.

[15] Staff of the Subcommittee on Social Security of the Committee on Ways and Means, Background Material on Social Security Hearings and Appeals, September 17, 1975, page 4.

[16] 42 U.S.C. §§ 1381–85, supp. II (1973).

[17] 42 U.S.C. § 1383(d)(2).

[18] See, for example, H.R. Rep. No. 231 92nd Cong., 1st Sess., 155–56 (1971).

It may well be that the demands upon an ALJ in a Social Security determination hearing so differ from the demands upon ALJs in other situations that such an exception to the standards applied in connection with the selection of other ALJs is justified. I am sure that the subcommittee can consider this matter with all the factual information available to it and reach an informed conclusion as to the manner, if any, on which such selection standards should be modified. Similarly, I assume that grade and compensation distinction based upon differences in function can be reviewed to see if modifications thereof are appropriate in this area. I am aware that Congressman Sisk has introduced a bill, H.R. 8018, which would eliminate the distinctions between ALJs in the Social Security Area and other administrative fields.

I basically believe in the appointment of ALJs to hear Social Security matters. Since I am firmly of the opinion that a truly "neutral and detached" officer should determine the results of first level appeals in the welfare system, I have, in turn, been led to the conclusion that ALJs should hear Social Security matters. The APA is the best vehicle yet devised, in an administrative setting, to insure a "neutral and detached" hearing; it should be made quite clear, therefore, that the APA's requirements for Civil Service Commission control over the appointment and promotion of ALJs should apply to *all* Social Security ALJs.

The APA was carefully designed to insure the independence of the ALJ from the agency in which he operates. It gave to the Civil Service Commission, rather than to the agency, the control of the ALJs pay, promotion and tenure.[19] While this independence is being achieved with respect to ALJs involved in the regular SSA hearings, it is not, regrettably, being achieved with respect to the hearing officers involved in SSI hearings.

As the members know from the Background Information provided by the staff, a 13-month-long dispute between HEW and the Civil Service Commission ended with the Secretary's reluctant acceptance of the Civil Service Commission's legal argument that the APA does not apply to SSI hearings. The result is a corps of Secretary-appointed hearing examiners, rather than ALJs.

These Secretary-appointed examiners operate under a system in which:

(1) they are to be appointed only with the Secretary's prior approval;

(2) their work is to be reviewed by the agency to determine whether it is of "an acceptable level of competence;"

(3) they may be promoted by the Secretary;

(4) the Secretary may withhold in-grade pay increases; and

(5) examiner removal is in the hands of the Secretary's appointees.[20]

There are two basic things wrong with this procedure. First, if an examiner is human, there must always be a doubt as to his independence and the impartiality of his decisions. Second, whether or not he is *in fact* independent, he will not *appear* to others to be independent.

I know personally that the Administrative Law Section of the ABA fought for a very long time, and I am sure will continue to fight, for the complete independence of the hearing officer or ALJ from the agency in which he operates. The reason is that no matter who he is, a person whose present and future financial and job security is in the hands of the people or agency he is judging can never be sure he is making an independent judgment. Whether we like it or not, career bureaucrats, and I use that term only descriptively, as do all of us, develop preferences and biases, and sometimes very fixed opinions, about the way things should be. That is why we should have the traditional "neutral and detached" officers to make decisions in appealed cases.

As was noted above, in the quote from the Supreme Court in *Goldberg*,[21] welfare, along with other forms of government entitlement, is a reality of our modern society. Our way of life, urbanized, specialized and technological as it is, almost guarantees that there will be some who cannot survive at an acceptable level without aid. Our urban society is a long way from 40 acres and a mule. Welfare is a cost we must pay for mking ourselves dependent upon each other by diminishing individual survival capabilities through urbanization and the other accomplishments of the division of technological and human labor.

Thus it is that the Supreme Court can find a "property" right in statutory welfare entitlements. Surely it is, therefore, not too much for us to act to insure that the millions of Americans who have such entitlement under welfare and SSI provisions have the procedural safeguards equal to those afforded corporations pursuing *their* property rights, be it a T.V. license or a freight rate adjustment or whatever.

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[19] See 5 U.S.C. §§ 5362 and 7521.

[20] Proposed HEW Regulations, 39 Fed. Reg. 19. 478–81 (1974).

[21] See note 8, *supra*, and accompanying text above.

The second objection to the present procedure is the lack of an *appearance* of neutrality. For many, the interaction with the social security apparatus is one of a very few direct contacts with their government. In an era such as this, I surely need not emphasize the need for the *appearance* of fairness and propriety in government. To a recipient or claimant fighting a termination or rejection in front of a decision maker who is not truly independent, that appearance is lacking.

I am aware that responsible voices argue that welfare programs are different from other programs in which ALJs function, and that we are inappropriately "over-judicializing" the welfare system. Perhaps however "judicialization" is the price for fairness. But I note and take encouragement from those, such as my friend Professor Victor Rosenblum,[22] who have correctly stated, in effect, that the APA is not a judicializing straitjacket. Section 556(d) of the APA provides, in part:

"In rule making or determining claims for money or benefits or applications for initial licenses, an agency *may*, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." (Emphasis added.)

I would like to see that section interpreted creatively by the agencies, the ALPs, and when necessary, the courts. Although *Goldberg*, among other cases, requires an oral hearing as a requirement of due process, it is probable, especially with the current composition of the Court, that abridged procedures undertaken with the voluntary, knowing and intelligent consent of all parties, could pass constitutional muster, and if so, thereby aid in cutting down this backlog, and preventing others. The *Eldridge* case,[23] of course, will help provide some answers in this area.

As to the backlog in the SSA, I suggest that the subcommittee direct its attention to the administrative areas discussed by Commissioner Cardwell last Friday, and by the subcommittee staff in its Background Materials to these hearings, in its Staff Survey of State Disability Agencies Under Social Security and SSI Programs, dated August 1, 1975, and in the earlier Report on the Disability Insurance Program prepared by the Staff of the Committee on Ways and Mens, dated July, 1974. In addition, I am sure there are other relevant documents with which I, as a social security "outsider," have less familiarity.

These administrative areas—the screening of pending disability appeals, informal remands, early face-to-face interviews, reduction of reconsideration and appeal request time, better staff assistance for ALJs, removal of ALJs from non-judicial functions, elimination or reduction of mandatory reconsideration—should all be given careful consideration. Their use should have at least some effect on the backlog. But I have not yet been shown how placing the decision maker under the APA will worsen the backlog. Indeed, I believe Commissioner Cardwell's testimony last week could be read to mean that the differentiation resulting in the case of ALJs for some cases and hearing examiners for SSI hearings is making the backlog worse by causing underutilization of the ALJs.[24]

I have reviewed the current state of the law on the question of whether the APA applies to SSI hearings. Without restating all the legislative and administrative history—a function the staff can, and no doubt has performed for you—I have concluded that there is indeed doubt as to what the courts would hold if the question of the APA's applicability to SSI hearings were to be presented. There are respectable and reasonable legal grounds for going either way.

However, I cannot believe that Congress intended such an ambiguity. Rather, as Chairman Ullman,[25] and Chairman Mills before him,[26] and the House Report[27] have all stated, the Congressional intention was to have the APA apply to SSI hearings, at least as to the control, pay and promotion of those who preside at such hearings.

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[22] See, for example, Rosenblum, the Administrative Law Judge in the Administrative Process: Interrelations of Case Law With Statutory and Pragmatic Factors in Determining ALJ Roles, A Second Draft of a Report to the Administrative Conference, September 8, 1975, pp. 147–150.

[23] See note 10, *supra*. *Eldridge* should decide whether a disability benefit can be *terminated* without a *Goldberg* type oral hearing.

[24] Statement of James B. Cardwell, Commissioner of Social Security Administration Before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives, September 19, 1975, pp. 7–9.

[25] Letter from the Honorable Al Ullman, Chairman, Committee on Ways and Means, to the Honorable Bernie F. Sisk, September 5, 1975.

[26] Statement of Representative Wilbur Mills, 117 Cong. Rec. 21, 405 (1971).

[27] H.R. Rep. Anno. 231, 92nd Cong., 1st Sess., 156.

I, therefore, urge this subcommittee, the Committee on Ways and Means, and ultimately the Congress, to resolve this dilemma by enacting mandatory language which leaves no doubt that it is the intent of Congress that those who have a claim to SSI and other welfare benefits shall have their appeals of adverse determinations heard by a truly "neutral and detached" officer—an Administrative Law Judge acting under the provisions of the Administrative Procedure Act.

Thank you, Mr. Chairman; I shall be happy to answer any questions.

Mr. BURKE. Thank you. Our next panelist is Mr. Matthews.

STATEMENT OF WILSON MATTHEWS

Mr. MATTHEWS. Thank you, Mr. Chairman. I hope you will bear with me. I have had laryngitis all week. I will try to come forward with my statement.

Mr. Chairman and members of the committee, it is a pleasure and a privilege to appear before you today for the purpose of discussing matters in which I have had a deep interest for over a quarter of a century. I have prepared a statement which I believe has been furnished to you.

I have been concerned over the last couple of years about the action taken in deciding that the Administrative Procedure Act is not applicable to the Supplemental Security Income as administered by the Social Security Administration. That decision in my judgment has probably set the field of administrative law back to where it was 30 or more years ago.

The procedures prior to 1946 were such that they caused the late Senator Pat McCarran, the late Senator Willis Smith, Congressmen Gwynee, Walters, Summers, and leaders of the legal profession Carl McFarland, Ashley Sellers, the late Clarence Miller, and others to work so hard to change the system by developing an act, namely, the Administrative Procedure Act, whereby the public would in the future be assured of due process through fair hearings by the appointment of unfettered presiding officers.

The Administrative Procedure Act has proved the test of time. Such presiding officers appointed under the APA became known in 1947 as hearing examiners and since 1971 have been called administrative law judges. The Administrative Procedure Act has granted independence to each of the judges to an extent whereby there is little, if any, contention concerning due process and fair hearings.

The administrative law judges do not have to fear the whims of an appointing official nor do they have to depend on the appointing official or the agency head for their retention in office, promotions, et cetera. They can make independent decisions and let the agencies do with the decisions what they will.

I thought this system had been forever settled up until about 2 years ago. I thought when I retired that possibly all of the growing pains were over in the Government with respect to appointments, promotions, and removals in the administrative law field and that the Government itself, administrative law judges, attorneys, legal aid societies, civil liberty groups, and others were prepared to carry out the procedures and substantive fuctions of the Administrative Procedure Act without further problems of lawsuits testing the act and its provisions as to hearings and presiding officers. However, I think this was possibly changed as a result of the action taken in the Supplemental Security Income field.

As a result of that action I have been looking for a new series of lawsuits testing the impact of the act which, if done, will take the American taxpayer back to the *Wong Yang Sung* days in the Immigration and Naturalization Service, the *Universal Camera* days in the NLRB, the *Federal Trial Examiner* v. *Ramspeck* days, the *Federal Home Loan Bank* v. *Long Beach Savings and Loan Association* days in the Federal Home Bank Board, and the *Riss Co.* and *Reliance Steel Co.* days in the ICC and many others.

Lawsuits we can't afford if we are to do our duty to the blind, the aged the disabled, and less advantaged. All of these cases I have referred to gave credence and stature to the Administrative Procedure Act and the judges, and set the course for an orderly progress in the field of administrative law.

Several of these cases caused agencies to change their thinking, the Post Office Department and the U.S. Coast Guard. We in the Commission negotiated with each of these agencies for a considerable period of time, trying to convince them that they came under the act.

It seems as though the Civil Service Commission by some legal mumbo-jumbo has now changed and doesn't want agencies under the act if it can possibly find some feeble ground to say no. In the early days when a general counsel and his agency determined the APA was applicable, we concurred because they were the ones who ultimately had to defend any question as to its applicability. At least the Commission didn't want to get in the position of second-guessing the courts if an action on applicability were filed.

We, on the other hand, were trying to convince agencies that they came within the act. Many agencies held out bringing themselves under the act until the Supreme Court handed down its decision in one or more of the cases to which I have previously referred.

Now unless something is done quickly, we will undoubtedly see a new series of lawsuits testing once again whether or not the APA is the authority in the administrative law field and particularly in the supplemental security income field.

Lawsuits contesting the supplemental security income procedures and hearings will affect the poor, the blind, the disabled, and those the least able to protect themselves. However, I am fearful that this will be the case unless the Social Security and Civil Service can come to a different understanding or unless you, the Congress, enacts legislation to cure the evil.

It is my fervent hope that possibly the discussions today will point the way to better understanding and help in finding a solution to a bad problem. If not settled, workloads of untold proportions will occur, the solution of which would have to be extraordinary congressional action because the public can't wait on judicial action.

In order to be more explicit concerning the whole subject, I should tell you that in 1973 the Civil Service Commission decided that persons to be appointed to hold hearings under the supplemental security income program in the Social Security Administration should not be APA examiners or law judges. This was a second decision.

The first held the APA applicable and the Bureau of Hearings and Appeals of the Social Security Administration set the decision in motion. I am not in a position to say what caused a change by the Commission. However, the Commission in the second decision reversed itself and held that such appointees should be attorneys in the GS-905 or attorney series and paid at the GS-13 and 14 grade levels.

While I also disagree with the grade levels which are too low, my primary disagreement is with the type or classification series attached to the incumbents. We all know that Government attorneys do not have protection from removal at the whim of the appointing officers. Thus there is no true independent presiding officer in the SSI program.

I know that there are certain laws, rules, and regulations that must be followed before a person can be removed from an attorney position, but they are not nearly as stringent as those applicable to appointees under the Administrative Procedure Act. Attorneys appointed as hearing examiners fail to have the independence of an Administrative Procedure Act judge even though they are presiding officers.

Furthermore, the fact that they cannot handle any APA-type cases results in an extreme hardship to the Social Security Administration. If due process and fair hearings are to be afforded, independence of the presiding officer must be paramount.

The judgment of one who is not independent is subject to the whim of an appointing official. His judgment can become warped and thus fair hearings and due process go out the window. The lack of independence may tend to cause appointees to ingratiate themselves with appointing officials either consciously or unconsciously. By doing this they possibly attempt to better their own future. It takes a strong-minded person to overlook the desires of his boss when one is looking to his future.

I do not say that persons appointed to these positions by the Bureau of Hearings and Appeals exercise judgments to conform to an appointing official's whims nor am I about to say the officials of the Bureau of Hearings and Appeals take advantage of the lack of independence by a presiding officer. But the type of appointment the supplemental security income appointees have lends itself to this and places a shadow on their independence.

With this backdrop allow me to more particularly speak of the impasse which now exists. From my research and knowledge of the legislative history going back to the Attorney General's committee of 1939 and my association with leaders of the bar in the administrative law field, I maintain that those leaders did not anticipate the present impasse.

The Commission has contended that the statute requiring or affording the opportunity for hearing in the SSI program does not require a "hearing on the record." With this we agree as to the statutory language. However, a hearing nevertheless is required by the supplemental security income statute.

The Commission also contended that the appointment section of the SSI statute does not call for hearing examiners or administrative law judges. With this I cannot agree as to the statutory language. I would like to say more about the hearings on the record at a later time.

The Commission also contended that the appointment section of the statute does not call for administrative law judges. The Commission pointed out in denying APA examiners to the Bureau of Hearings and Appeals that the law required a decision to be made within 90 days and in view of the experience acquired in the administrative law field, the requirement of 90 days would be unreasonable. Thus, Congress could not have contemplated the use of hearing examiners in the supplemental security income program.

I am aware of this because I was asked by the Bureau of Hearings and Appeals to become a consultant during and after negotiations with the Civil Service Commission.

I grant that while the supplemental security income staute requires a hearing or an opportunity for a hearing, the statute does not require a hearing on the record by so many words. I would like to point out that in connection with "hearings on the record" the late Senator Pat McCarran, who was cosponsor of the Administrative Procedure Act, wrote soon after the enactment of the Administrative Procedure Act the following, and I quote:

> Shortly after the adoption of the Act it came to be widely assumed among agencies that, unless the statute authorizing an administrative function expressly acquired a hearing, the Administrative Procedure Act did not apply. Some went further and assumed that sections 5, 7 and 8 of the Act did not apply unless there was express statutory requirement not only of a "hearing" but of decision on the record as well. Still another form of contention was that, although hearings might be required by "law" in the sense that constitutional requisites could not be met without a hearing at the administrative level, such situations were to be distinguished from those in which statutes themselves plainly stated the hearing prerequisite. But all of these arguments were simply forms of words . . .

The *Wong Yang Sung* case with which all of you are acquainted verifies Senator McCarron's thoughts that words such as law, statute, and hearings on the record are simply forms of words. I won't go into the *Wong Yang Sung* case because I am sure all of you are well acquainted with it. This was an Immigration and Naturalization Service case and was the first test of the Administrative Procedure Act.

In view of Senator McCarran's statement I must disagree with the Commission's position that the words "hearing on the record" must appear in the statute. Furthermore, the SSI statute calls for judicial review. I ask you how can the courts make a judicial review if there is no record?

Second, the Commission contended that the appointment section of the statute did not call for hearing examiners. With this I cannot agree.

Congress specifically referred to the position of hearing examiner—now administrative law judge—not once, but twice, in the appointment section of the SSI act. This section did, however, exclude such appointments from the "special" standards prescribed for hearing examiners under subchapter II of chapter 5 of title IV of the United States Code. Congress must have been fully aware of hearing examiners positions when they pointed out such in the appointment sections of the act.

Congress must have also been aware that possibly the Commission could not furnish the required manpower in sufficient time to put the statute in effect and, therefore, gave the Secretary of HEW the opportunity to operate within the perimeters of the APA, but not under the exact requirements.

Also, if we review subchapter II of chapter 5 of title V of the code, you will find no specific appointment standards. The standards that Congress must have been referring to appear in those set out in the administrative document of the Civil Service Commission; namely, administrative law judge announcement 318.

With respect to the 90-day required hearing argument, a close review of the Supplemental Security Income Act reveals that it forces the 90-day period only in those cases involving the aged, blind, and resource cases, but excludes disability cases, which are not unlike the present title II social security cases. There is no mandatory time limit with regard to disability cases.

I, therefore, believe this is a fallacious argument. Furthermore, I cannot discount the words of former Chairman Mills of your committee who shepherded the Supplemental Security Income Act through Congress when he said on the floor during the debate:

> The hearing to which the bill refers would be subject to the Administrative Procedure Act and all the safeguards for a fair and equitable hearing in the Act would apply to the hearing.

I refer to the Congressional Record of July 22, 1971. This was in response to a question asked of Chairman Mills on the floor. When a statute appears not to be clear in and of itself, one must rely on the legislative history. There was a dispute between two agencies and I am afraid legislative history was ignored.

It seemed plain to me the history was made on the floor when Chairman Mills responded. For all of the above reasons I disagree with my friends in the Commission and I contend that presiding officers in the supplemental security income program should be APA appointees and should be administrative law judges.

Let's now look as to what happened after the decision of the Commission. The Bureau of Hearings and Appeals being unable to appoint administrative law judges set about under the leadership of Mr. H. Dale Cook, now U.S. district court Judge Cook, to set up the best possible system for the appointment of presiding officers and to give them as much independence as possible.

Under the direction of the Secretary of HEW the Social Security Administration was required to establish and conduct an examination as nearly like that of the Civil Service Commission as possible, and, if feasible, use to the extent possible the same standards and procedures.

The Bureau of Hearings and Appeals and the Department of Health, Education, and Welfare wrote a set of regulations not too unlike those of Civil Service Commission in an attempt to give to the presiding officers in the SSI program as much independence as possible. Removal would be made by the Secretary on charges brought by the Director of the Bureau of Hearings and Appeals.

Presiding officers [hearing examiners] could not be transferred except through the Secretary's office. However, there were two problems that we could not overcome. One concerns the matter of ingrade salary increase. As you know. with respect to administrative law judges, ingrade increases are automatic and are not subject to action by a supervision. I am sorry to say that the Bureau of Hearings and Appeals regulations did not and could not legally afford the SSI presiding officer [hearing examiner] the same automatic increase.

Secondly, the hearing officer in the SSI program must be given a certificate of acceptable level of competence before he can receive the ingrade increase. In other words, the presiding officers in the supplemental security program are assigned efficiency ratings which affect their ingrade increase and their possible movement to higher grades.

I think that it can be seen that true independence to BHA presiding officers in the supplemental security income field is not present and cannot be, even though we all have the greatest faith in the Secretary, the Director, his Deputy Director and all supervisors and the presiding officers themselves. Nevertheless, the independence—true independence that is—is not present in this job. If it is not true independence who suffers? The taxpayer, the blind, the aged, and the disabled and possibly the presiding officer if at some time he fails to make a sufficient number of decisions in the manner desired by the agency. These are the ones who suffer.

One other brief statement and that is to say that the Bureau of Hearings and Appeals conducted an examination in which applications were received from approximately 1,400 attorneys throughout the United States. Of this number approximately 350 were found eligible at the GS–13 and 14 levels.

The Bureau of Hearings and Appeals has, as I understand it, about 125 of these people now presiding at hearings. I believe the Bureau conducted a fair and reasonable examination under the standards and has granted to the presiding officers the autonomy it can grant, but still it falls short of that of administrative law judges.

I only wish it could have been possible for the Commission to have determined that these positions were administrative law judges and all of the problems that we foresaw then and foresee now would have been eliminated. The examination to which I refer was conducted in the same manner as the administrative law judge in the Commission.

Only those trained in the law did the preliminary work in screening applicants at the first instance. All the reviewers were lawyers. Confidential questionnaires [vouchers] were sent to a minimum of 20 persons, most of whom were lawyers who had knowledge of the applicant's ability and capability for a judicial-type position.

A written demonstration similar to that given by the Commission was also used. In fact, the Bureau employed an administrative law professor from one of the leading local law schools (the same one the Commission uses) to prepare, I believe, six separate legal situations. One of these was used in each of the examinations for the applicant to ponder and write a legal opinion as if he were a judge sitting in the case with the same facts before him. All persons now presiding underwent this vigorous examination. Oral interviews were held by three-person panels, at least two of whom were attorneys with one of the two being a private practitioner. Most competitors were private practitioners, State officials and lawyers, and Federal lawyers.

The examination was practically on all fours with that conducted by the Civil Service Commission except that 4 years of practice was necessary for GS–13 and 6 years for GS–14 whereas the Commission otherwise requires 7 years for all grades.

The examination was conducted in this light, looking forward to the day when the question of APA applicability would be settled by the courts, in Congress, and the Commission under its regulations could then make the incumbent presiding officers administrative law judges without much fuss and feathers. I will be glad to address myself to this regulation should you desire.

With all Bureau of Hearings and Appeals hearing personnel serving as administrative law judges, the agency could operate at maximum speed and efficiency.

I recommend that some sort of action, either settlement of the issue by the Social Security and the Commission looking toward APA guides or congressional action, be taken once and for all, declaring such title XVI Supplemental Security Income hearing examiners positions now encountered and future hearing positions in the program to be administrative law judge positions under the Administrative Procedure Act.

There should be no second-class justice. The individual, the poor, the blind, the disabled, and the elderly should have the same level of hearing or the same level of judicial decision with the same independence of judgment and actions as do the big steel industries, the airlines, the railroads, the waterways, the miners under the mine safety program and industrial employees under the occupation health and safety programs, labor relations, et cetera.

I further recommend that speedier action than present be taken and all administrative law judges be given the authority to make final decisions binding upon the agency unless an appeal is taken by the claimant, not the Government. After all, administrative law judges are lawyers with years of training in their own right and before starting hearings, the BHA has given them weeks of training in their field of operation.

Reviews should be cut to a minimum and I am not convinced this has been true in the past in the BHA. Possibly a system similar to that used in CAB in appeals could be adopted, a certiorari-type proceeding.

Thank you for the opportunity to appear before you today. I will be happy to answer any questions to the best of my ability.

[The prepared statement follows:]

STATEMENT OF WILSON M. MATTHEWS, ALEXANDRIA, VA.

Mr. Chairman and members of the committee. it is a pleasure and a privilege to appear before you today for the purpose of discussing matters in which I have had a deep interest for over a quarter of a century. I have prepared a statement which I believe has been furnished to you.

From enactment of the Administrative Procedure Act in 1946 until 1971, I was active in its administration by the Civil Service Commission and was for years, until I retired in 1971, the Director of the Office of Hearing Examiners now Administrative Law Judges.

I appear before you today as a private citizen. I am and have been for the last couple of years concerned over the action taken by my former agency in deciding that the Administrative Procedure Act is not applicable to the Supplemental Security Income as administered by the Social Security Administration. That decision in my judgment has probably set the field of administrative law back to where it was 30 or more years ago. The action denying APA applicability to the appointment of personnel to conduct hearings in the Supplemental Security Income program reconstituted the hearing theories and appointment procedures existing in agencies prior to 1946. I apologize to the Commission for this statement and hated to make it when I spoke in 1974 before a section of the Federal Bar Association on the subject. The Commission was wonderful to me and I still hate to find it necessary to be in disagreement with its actions.

The procedures prior to 1946 were such that they caused the late Senator Pat McCarran, the late Senator Willis Smith, Congressmen Gwynee, Walters, Summers and leaders of the legal profession Carl McFarland, Ashley Sellers, the late Clarence Miller and others to work so hard to change the system by developing an act, namely the Administrative Procedure Act, whereby the public would in the future be assured of due process through fair hearings by the appointment of unfettered presiding officers, that is, hearing officers appointed through administration by an individual agency, namely the Civil Service Commission, and not selections by the operating agency on a case by case basis from its staff of attorneys. The Administrative Procedure Act has proved the test of time. Such presiding officers appointed under the APA became known in 1947 as Hearing Examiners and since 1972 have been called Administrative Law Judges. The Administrative Procedure Act has granted independence to each of the Judges to an extent whereby there is little if any contention concerning due process and fair hearings. The Administrative Law Judges do not have to fear the whims of an appointing official nor do they have to depend on the appointing official or the agency head for their retention in office, promotions, etc. They can make independent decisions and let the agencies do with the decisions what they will. I thought this system had been forever settled up until about 2 years ago. I thought when I retired that possibly all of the growing pains were over in the government, with respect to appointments, promotions and removals in the administrative law field and that the government itself, Administrative Law Judges, attorneys, legal aid societies, civil liberty groups and others were prepared to carry out the procedures and substantive functions of the Administrative Procedure Act without further problems or lawsuits testing the Act and its provisions as to hearings and presiding officers.

However, I think this was possibly changed as a result of the action taken in the Supplemental Security Income field. As a result of that action I have been looking for a new series of lawsuits testing the impact of the Act which if done will take the American Taxpayer back to the Wong Yang Sung days, in the Immigration and Naturalization Service, the Universal Camera days in the NLRB, the Federal Trial Examiner vs. Ramspect days, the Federal Home Loan Bank vs. Long Beach Savings and Loan Association days in the Federal Home Loan Bank Board, and the Riss Co. and Reliance Steel Co. days in the I.C.C. and many others. Lawsuits we can't afford if we are to do our duty to the blind, the aged, the disabled and less advantaged. All of these cases I have referred to gave credence and stature to the Administrative Procedure Act and the Judges and set the course for orderly progress in the field of administrative law. Several of these cases caused agencies to change their thinking and to start complying with the Act. I make reference in particular to the Post Office Department and the U.S. Coast Guard. We in the Commission negotiated with each of these agencies for a considerable period of time trying to convince them that they came under the Act.

It seems as though the Civil Service Commission by some legal mumbo-jumbo has now changed and doesn't want agencies under the Act if it can possibly find some feeble ground to say no. In the early days when a General Council and his agency determined the APA was applicable we concurred because they were the ones who ultimately had to defend any question as to its applicability. At least the Commission didn't want to get in the position of second guessing the courts if an action on applicability were filed. We on the other hand were trying to convince agencies that they came within the Act. Many agencies held out bringing themselves under the Act until the Supreme Court handed down its decisions in one or more of the cases to which I've previously referred. In the early days there were at least 17 cases testing the authority of the Administrative Procedure Act. Now unless something is done quickly, we will undoubtedly see a new series of lawsuits testing once again whether or not the APA is the authority in the Administrative Law field and particularly the Supplemental Security Income field.

These future lawsuits which will no doubt be interesting will, nevertheless affect those who should not be affected. Lawsuits contesting the supplemental security income procedures and hearings will affect the poor, the blind, the disabled and those the least able to protect themselves. However, I am fearful that this will be the case unless the Social Security and Civil Service can come to a different understanding or unless Congress enacts legislation to cure the evil. It is my fervent hope that possibly the discussions today will point the way to better understanding and help in finding a solution to a bad problem. If not settled, work loads of untold proportions will occur, the solution of which would have to be extraordinary Congressional action because the public can't wait on judicial action. In order to be more explicit concerning the whole subject I should tell you that in 1973 the Civil Service Commission decided that persons to be appointed to hold hearings under the Supplemental Security Income Program in the Social Security Administration should not be APA examiners or law judges. This was a second decision. The first held the APA applicable and the Bureau of Hearings and Appeals of the Social Security Administration set the decision in motion. I am not in a position to say what caused a change by the Commission.

However, the Commission in the second decision reversed itself and held that such appointees should be attorneys in the GS–905 or "attorney series" and paid at the GS–13 and 14 grade levels. While I also disagree with the grade levels which are too low, my primary disagreement is with the type or classification series attached to the incumbents. We all know that government attorneys do not have protection from removal at the whim of the appointing officers. Thus there is no true independent presiding officer in the SSI Program. I know that there are certain laws, rules and regulations that must be followed before a person can be removed from an attorney position but they are not nearly as stringent as those applicable to appointees under the Administrative Procedure Act. Attorneys appointed as Hearing Examiners fail to have the independence of an Administrative Procedure Act Judge even though they are presiding officers. Furthermore, the fact that they cannot handle any APA type cases results in an extreme hardship to the Social Security Administration, possibly one of the causes of the huge backlog that exists. If due process and fair hearings are to be afforded, independence of the presiding officer must be paramount. The judgment of one who is not independent is subject to the whim of an appointing official. His judgment can become warped and thus fair hearings and due process go out the window. The lack of independence may tend to cause appointees to ingratiate themselves with appointing officials either consciously or unconsciously. By doing this they possibly attempt to better their own future. It takes a strong-minded person to overlook the desires of his boss when one is looking to his future. I do not say that persons appointed to these positions by the Bureau of Hearings and Appeals exercise judgments to conform to an appointing official's whims nor am I about to say the officials of the Bureau of Hearings and Appeals take advantage of the lack of independence by a presiding officer. But the type of appointment the Supplemental Security Income appointees have lends itself to this and places a shadow on their independence.

With this backdrop allow me to more particularly speak of the impasse which now exists. From my research and knowledge of the legislative history going back to the Attorney General's Committee of 1939 and my association with leaders of the Bar in the administrative law field, I maintain that those leaders did not anticipate the present impasse. The Commission has contended that the statute requiring or affording the opportunity for hearing in the SSI program does not require a "hearing on the record." With this we agree as to the statutory language. However, a hearing nevertheless is required by the Supplemental Security Income Statute. The Commission also contended that the Appointment Section of the SSI statute does not call for Hearing Examiners or Administrative Law Judges. With this I cannot agree as to the statutory language. I would like to say more about the hearings on the record at a later time. The Commission also contended that the Appointment Section of the statute does not call for Administrative Law Judges. The Commission pointed out in denying APA examiners to the Bureau of Hearings and Appeals that the law required a decision to be made within 90 days and in view of the experience acquired in the administrative law field, the requirement of 90 days would be unreasonable. Thus, Congress could not have contemplated the use of Hearing Examiners in the Supplemental Security Income Program. I am aware of this because I was asked by the Bureau of Hearings and Appeals to become a consultant during and after negotiations with the Civil Service Commission. For all of the above reasons the Civil Service determined that the Bureau of Hearings and Appeals could not employ Administrative Law Judges to hear SSI cases. Now let's go back briefly and look at each of the Commission's reasons and discuss them.

I grant that while the Supplemental Security Income statute requires a hearing or an opportunity for a hearing the statute does not require a hearing on the record by so many words. I would like to point out that in connection with "hearings on the record" the late Senator McCarran who was co-sponsor of the Administrative Procedure Act wrote soon after the enactment of the Administrative Procedure Act the following, and I quote:

"Shortly after the adoption of the Act it came to be widely assumed among agencies that, unless the statute authorizing an administrative function expressly required a hearing, the Administrative Procedure Act did not apply. Some went further and assumed that sections 4, 7 and 8 of the Act did not apply unless there was express statutory requirement not only of a 'hearing' but of decision on the record as well. Still another form of contention was that, although hearings might be required by 'law' in the sense that constitutional requisites could not be met without a hearing at the administrative level, such situations were to be distinguished from those in which statutes themselves plainly stated the hearing prerequisite. But all of these arguments were simply forms of words . . ."

The Wong Yang Sung case with which all of you are acquainted verifies Senator McCarran's thoughts that words such as law statute and hearings on the record are simply forms of words. I won't go into the Wong Yang Sung case because I am sure all of you are well acquainted with it. This was an Immigration and Naturalization Service case and was the first test of the Administrative Procedure Act. In view of Senator McCarran's statement I must disagree with the Commission's position that the words "hearing on the record" must appear in the statute. Furthermore, the SSI statute calls for judicial review. I ask you how can the courts make a judicial review if there is no record?

Secondly, the Commission contended that the Appointment Section of the statute did not call for Hearing Examiners. With this I cannot agree. Congress specifically referred to the position of Hearing Examiner (now Administrative Law Judge) not once but twice in the Appointment Section of the SSI Act. This Section, did, however, exclude such appointments from the "special" standards prescribed for Hearing Examiners under Subchapter II of Chapter 5 of Title IV of United States Code. Congress must have been fully aware of Hearing Examiners positions when they pointed out such in the Appointment Sections of the Act. Congress must have also been aware that possibly the Commission could not furnish the required manpower in sufficient time to put the statute in effect and therefore gave the Secretary of HEW the opportunity to operate within the perimeters of the APA but not under the exact requirements. Also, if we review Subchapter II or Chapter 5 of Title V of the Code you will find no specific appointment standards. The standards that Congress must have been referring to appear in those set out in the administrative document of the Civil Service Commission, namely, Administrative Law Judge Announcement 318.

With respect to the 90 day required hearing argument, a close review of the Supplemental Security Income Act reveals that it forces the 90 day period only in those cases involving the aged, blind and resource cases, but excludes disability cases, which are not unlike the present Title II Social Security cases. There is no mandatory time limit with regard to disability cases. I, therefore, believe this is a fallacious argument. Furthermore, I cannot discount the words of former Chairman Mills of your Committee who shepherded the Supplemental Security Income Act through Congress when he said on the floor during the debate: "The hearing to which the bill refers would be subject to the Administrative Procedure Act and all the safeguards for a fair and equitable hearing in the Act would apply to the hearing." I refer to the Congressional Record of July 22, 1971. This was in response to a question asked of Chairman Mills on the floor. When a statute appears not to be clear in and of itself one must rely on the legislative history. There was a dispute between two agencies and I am afraid legislative history was ignored. It seemed plain to me the history was made on the floor when Chairman Mills responded. For all of the above reasons I disagree with my friends in the Commission and I contend that presiding officers in the Supplemental Security Income Program should be APA appointees and should be Administrative Law Judges.

Let's now look as to what happened after the decision of the Commission. The Bureau of Hearings and Appeals being unable to appoint Administrative Law Judges set about under the leadership of Mr. H. Dale Cook, now U.S. District Court Judge Cook, to set up the best possible system for the appointment of presiding officers and to give them as much independence as possible. Under the direction of the Secretary of HEW the Social Security Administration was required to establish and conduct an examination as nearly like that of the Civil Service Commission, as possible, and if feasible, use to the extent possible the same standards and procedures. The Bureau of Hearings and Appeals and the Department of Health, Education and Welfare wrote a set of regulations not too unlike those of Civil Service Commission in an attempt to give to the presiding officers in the SSI Program as much independence as possible. Removal would be made by the Secretary on charges brought by the Director of the Bureau of Hearings and Appeals. Presiding officers (Hearing Examiners) could not be transferred except through the Secretary's office. However, there were two problems that we could not overcome. One concerns the matter of in-grade salary increases. As you know, with respect to Administrative Law Judges, in-grade increases are automatic and are not subject to action by a supervisor. I am sorry to say that the Bureau of Hearings and Appeals regulations did not and could not legally afford the SSI Presiding Officer (Hearing Examiner) the same automatic increase. Secondly, the Hearing Officer in the SSI Program must be given a certificate of acceptable level of competence before he can receive the in-grade increase.

In other words, the Presiding Officers in the Supplemental Security Program are assigned efficiency ratings which affect their in-grade increase and their possible movement to higher grades. I think that it can be seen that true independence of BHA presiding officers in the Supplemental Security Income field is not present and cannot be, even though we all have the greatest faith in the Secretary, the Director, his Deputy Director and all Supervisors and the Presiding Officers themselves. Nevertheless, the independence true independence that is, is not present in this job. If it is not true independence who suffers? The taxpayer, the blind, the aged and the disabled and possibly the Presiding Officer if at some time he fails to make a sufficient number of decisions in the manner desired by the agency. These are the ones who suffer.

One other brief statement and that is to say that the Bureau of Hearings and Appeals conducted an examination in which applications were received from approximately 1400 attorneys throughout United States. Of this number approximately 350 were found eligible at the GS–13 and 14 levels. The Bureau of Hearings and Appeals has as I understand it about 125 of these people now presiding at hearings. I believe the Bureau conducted a fair and responsible examination under the standards and has granted to the Presiding Officers the autonomy it can grant but still, it falls short of that of Administrative Law Judges. I only wish it could have been possible for the Commission to have determined that these positions were Administrative Law Judges and all of the problems that we foresaw then and foresee now would have been eliminated. The examination to which I refer was conducted in the same manner as the Administrative Law Judge in the Commission. Only those trained in the law did the preliminary work in screening applicants at the first instance. All the reviewers were lawyers. Confidential questionnaires (vouchers) were sent to a minimum of 20 persons most of whom were lawyers who had knowledge of the applicant's ability and capability for a judicial type position. A written demonstration similar to that given by the Commission was also used. In fact the Bureau employed an Administrative Law professor from one of the leading local law schools (the same one the Commission uses) to prepare, I believe, 6 separate legal situations. One of these was used in each of the examinations for the applicant to ponder and write a legal opinion as if he were a judge sitting in the case with the same facts before him. All persons now presiding underwent this vigorous examination. Oral interviews were held by 3 person panels, at least two of whom were attorneys with one of the two being a private practitioner.

Most competitors were private practitioners, state officials and lawyers and Federal lawyers.

The examination was practically on all fours with that conducted by the Civil Service Commission except that four years of practice was necessary for GS–13 and six years for GS–14 whereas the Commission otherwise requires seven years for all grades.

The examination was conducted in this light looking forward to the day when the question of APA applicability would be settled by the Courts in Congress and the Commission under its regulations could then make the incumbent presiding officers Administrative Law Judges without much fuss and feathers. I'll be glad to address myself to this regulation should you desire.

With all Bureau of Hearings and Appeals Hearing Personnel serving as Administrative Law Judges the agency could operate at maximum speed and efficiency.

I recommend that some sort of action, either settlement of the issue by the Social Security and the Commission looking toward APA guides or Congressional action be taken once and for all declaring such Title XVI Supplemental Security Income Hearing Examiners positions now encountered and future hearing positions in the program to be Administrative Law Judge positions under the Administrative Procedure Act. There should be no second class justice. The individual, the poor, the blind, the disabled and the elderly should have the same level of hearing or the same level of judicial decision with the same independence of judgment and actions as do the big steel industries, the airlines, the railroads, the waterways, the miners under the mine safety program and industrial employees under the occupations, health and safety programs, labor relations, etc.

I further recommend that speedier action than present be taken and all Administrative Law Judges be given the authority to make final decisions binding upon the agency unless an appeal is taken by the claimant not the government. After all, Administrative Law Judges are lawyers with years of training in their own right and before starting hearings the BHA has given them weeks of training in their field of operation. Reviews should be cut to a minimum and I am not convinced this has been true in the past in the BHA. Possibly a system similar to that used in CAB in Appeals could be adopted. A certiorari type proceedings. Thank you for the opportunity to appear before you today. I'll be happy to answer any questions to the best of my ability.

Mr. BURKE. Thank you, Mr. Matthews.

Professor Rosenblum.

STATEMENT OF VICTOR G. ROSENBLUM

Mr. ROSENBLUM. Thank you, Mr. Chairman. It is an honor for me to be able to participate in this panel discussion before the distinguished members of this subcommittee. It is a special pleasure to note the distinguished Congressmen from my State on the job, as indeed they always are.

I don't want to repeat the many points with which I am in complete agreement that have been made by my colleagues on the panel this morning, but I do want to make clear that I am in strong disagreement with the position of my good friend and colleague, Bob Dixon, with regard to the dichotomy that Bob seeks to draw between benefit hearings, on the one hand, and hearings before other regulatory bodies, on the other.

I believe strongly that the vitality, creativity, and fairness of the administrative process have been enhanced by the adoption and utilization of the Administrative Procedure Act. The Supreme Court's construction of constitutional requirements and the Administrative Procedure Act over the years has encouraged flexibility and discretion in the administrative process while, at the same time, insisting that every American has the right to be treated fairly and impartially by Government agencies.

Despite the judiciary's generally sensible constructions, fears continue to be voiced, as in the battle over the status of SSI hearing officers, that applicability of the APA is to be equated with rigidification of the administrative process.

The focus of the APA was not on judicialization, but on fairness and impartiality in wielding administrative skills and responsibilities. The framers of the APA rightly assumed that there is greater assurance of fairness as well as of expertise of a hearing officer who is insulated from agency pressures and governed directly by Civil Service Commission personnel standards than who is obligated for tenure and evaluation to the very agency over whose cases he or she presides.

Those who fear that administrative law judges appointed pursuant to the APA will rigidify and judicialize our administrative proceedings misconstrue the history, purposes, and practices of APA hearing officers. They also ignore the last sentence of section 556(d) of the APA which authorizes an agency to "adopt procedures for the submission of all or part of the evidence in written form" in rulemaking and determining claims for money or benefits when a party will not be prejudiced by it.

Applicants for benefits or redress pursuant to Federal law merit the same degree of competence and impartiality of hearing officers as do parties to FCC, FPC, CAB, or other regualtory agency adjudications. They may not invariably need, however, to confront witnesses, cross-examine them, or present oral testimony.

Section 556(d) removes any danger whatever that overjudicialization of benefits hearings will stem from their inclusion under the APA. There should be extensive use and expansion of the scope of application of section 556(d) to speed agency hearing processes as well as expansion of the corps of APA administrative law judges to assure requisite impartiality and professional skill.

Adoption of the administration law section of the American Bar Association's recommendation for abridged procedures with the consent of the parties in all cases required to be heard on the record before an administrative law judge, would also have a salutary effect on the management of hearings. In essence, the APA encourages rather than limits the agencies in following Professor Boyer's advice to "take the initiative in devoting thought and effort to refining procedural techniques," as well as in building upon Professor Mashaw's proposal for "a management approach to due process" that can provide fair, accurate, and timely adjudication of claims without becoming mired in judicial formalism.

I propose four core steps that can help to maximize the fairness and efficiency of performance by hearing officers involved in social security cases. Implementation of these steps requires candor and foresight rather than any radical surgery.

1. Congress must make explicit choices about whether APA hearing requirements shall apply whenever legislation involving administrative hearings is considered.

2. Administrative agencies must formulate and articulate their policies with candor and clarity to facilitate prompt and competent decisions by administrative law judges, and avoid seeking or accepting special congressional authority to appoint hearing officers outside the APA when the agency expects or intends otherwise to be bound by APA hearing procedures.

The language in the draft of section 1631(c)(3) of H.R. 8911 offers a specific example of what I believe Congress and the agencies should not do. That language giving the Secretary of HEW discretion to appoint hearing examiners outside of the APA is filled with penumbras and quasi-decisions that will add to the burdens of the courts in construing their meaning and will subtract from the protection of the ordinary American involved in Federal agency proceedings.

3. The Civil Service Commission must (a) recognize, in deciding on the preparation and issuance of administrative law judge registers, the legal primacy of statutory interpretation belongs to the agency charged with responsibility for administration of a particular statute; (b) follow up and institutionalize the La Macchia Committee study as a continuing instrument for gaging opinions and attitudes of and toward administrative law judges concerning their independence, integrity, quality, and quantity of professional performance. The La Macchia Committee, chaired by the Civil Service Commission's deputy counsel, produced a study that sought the opinions of all of the ALJ's and samples of private practitioners and Bar Association representatives about the quality and quantity of the ALJ workload prod-

ucts, about standards for review of ALJ decisions and standards for recruitment of ALJ's.

The study has been invaluable in initiating development of an empirical base for the enhancement of efficacy and evaluation standards in the ALJ program.

The Civil Service Commission should also develop in conjunction with the administrative law judges other systematic programs for measurement and evaluation of their work and for continuing education that broadens and deepens their professional skills. In effect, the development of a legal training institute within the Civil Service Commission to provide training for Government officials, including ALJ's and the availability today of the Center for Administrative Justice of the American Bar Association, for the development of similar kinds of programs provide invaluable forms of assistance for the enhancement of the educational skills and professional expertise of administrative law judges.

4. With regard to the administrative law judges themselves, I believe that they must implement with equal stringency and meticulousness policies, projects, and programs that protect their independence and integrity, and enhance the confidence of the profession and the public in their work through establishment and monitoring of standards of productivity and performance.

Demonstration of the unique strength of the administrative process as an instrument of justice for all Americans can best be made—not by Balkanizing it through widespread exemptions of hearing officials from APA coverage—but by utilizing the APA fully, creatively, and consistently. APA administrative law judges currently offer our best hope for a corps of broad gaged, efficient presiding officers and decisionmakers who combine substantive sophistication and expertise with procedural fairness, initiative, and flexibility.

[The prepared statement follows:]

STATEMENT OF VICTOR G. ROSENBLUM, NORTHWESTERN UNIVERSITY

It is an honor for me to be able to participate in this panel discussion before the distinguished members of this Subcommittee.

I believe strongly that the vitality, creativity, and fairness of the administrative process have been enhanced by the adoption and utilization of the Administrative Procedure Act. The Supreme Court's construction of Constitutional requirements and the Administrative Procedure Act over the years has encouraged flexibility and discretion in the administrative process while at the same time insisting that every American has the right to be treated fairly and impartially by government agencies. Despite the judiciary's generally sensible constructions, fears continue to be voiced—as in the battle over the status of SSI hearing officers and in the discussions over HR 8911's provisions for the appointment of hearing officers at the discretion of the Secretary of HEW—that applicability of the APA is to be equated with rigidification of the administrative process. The focus of the APA was not on judicialization but on fairness and impartiality in wielding administrative skills and responsibilities. The framers of the APA rightly assumed that there is greater assurance of fairness as well as of expertise of a hearing officer who is insulated from agency pressures and governed directly by Civil Service Commission personnel standards than who is obligated for tenure and evaluation to the very agency over whose cases he or she presides. Those who fear that Administrative Law Judges appointed pursuant to the APA will rigidify and judicialize our administrative proceedings misconstrue the history, purposes, and practices of APA hearing officers. They also ignore the last sentence of § 556 (d) of the APA which authorizes an agency to "adopt procedures for the submission of all or part of the evidence in written form" in rulemaking and determining claims for money or benefits when a party will not be prejudiced by it.

Applicants for benefits or redress pursuant to federal law merit the same degree of competence and impartiality of hearing officers as do parties to FCC, FPC, CAB, or other regulatory agency adjudications. They may not invariably need, however, to confront witnesses, cross-examine them, or present oral testimony. Section 556 (d) removes any danger whatever that over-judicialization of benefits hearings will stem from their inclusion under the APA. There should be extensive use and expansion of the scope of application of § 556 (d) to speed agency hearing processes as well as expansion of the corps of APA Administrative Law Judges to assure requisite impartiality and professional skill. Rapid adoption of the Administrative Law Section of the American Bar Association's recommendation for abridged procedures with the consent of the parties in all cases required to be heard on the record before an Administrative Law Judge would also have a salutary effect on the management of hearings. In essence, the APA encourages rather than limits the agencies in following Professor Boyer's advice to "take the initiative in devoting thought and effort to refining procedural techniques," as well as in building upon Professor Mashaw's proposal for "a management approach to due process" that can provide fair, accurate and timely adjudication of claims without becoming mired in judicial formalism.

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3. The Civil Service Commission must (a) recognize in deciding on preparation and issuance of Administrative Law Judge registers, the legal primacy of statutory interpretation by the agency charged with responsibility for administration of a particular statute; (b) follow up and institutionalize the La Macchia Committee study as continuing instrument for gauging opinions and attitudes of and toward Administrative Law Judges concerning their independent, integrity, quality, and quantity of professional performance; and (c) develop in conjunction with the Administrative Law Judges other systematic programs for measurement and evaluation of their work and for continuing education that broadens and deepens their professional skills.

4. Administrative Law Judges must implement with equal stringency and maticulousness policies, projects, and programs that (a) protect their independence and integrity and (b) enhance the confidence of the profession and the public in their work through establishment and monitoring of standards of productivity and performance.

Demonstration of the unique strength of the administrative process as an instrument of justice for all Americans can best be made—not by Balkanizing it through widespread exemptions of hearing officials from APA coverage—but by utilizing the APA fully, creatively, and consistently. APA administrative law judges currently offer our best hope for a corps of broad gauged, efficient presiding officers and decision makers who combine substantive sophistication and expertise with procedural fairness, initiative, and flexibility.

Mr. BURKE. The last panelist is Mr. Yourman.

STATEMENT OF EDWIN YOURMAN

Mr. YOURMAN. Thank you, Mr. Chairman.

Mr. Chairman, members of the committee, I appreciate very much this opportunity of participating today. I filed a statement with the committee, and I shall only make here a very concise summary of the points in that statement.

Mr. **Burke**. Without objection, your entire statement will appear in the record.

Mr. **Yourman**. The chairman a while ago mentioned the rain today. For me, at least, I found one aspect of it rather appropriate to the fact that the hearing is held today. About 6 o'clock this morning, as other members of my family and I were trying to dispose of some water in the basement, we found that it was coming in faster than we could get it out. I thought that that was very much the situation of the Social Security Administration in its appeals.

First, I also want to compliment the committee upon the fine work its staff has done in producing studies of the disability system and the background materials which it recently published.

On the question of legislative policy for applying the Administrative Procedures Act to social security hearings, I start from the point that the Administrative Procedures Act has already been established as the basic system for adjudicatory hearings in the Federal Government and that, therefore, it should apply to all types of social security beneficiary hearings in the absence of some specific reason for an exemption.

I have tried to analyze the differences between the beneficiary hearings and others. One obvious difference is the volume of cases. There are also a number of differences in the subject matter of the hearing and the way the hearings are conducted, the fact that they are not adversary, and these I have listed in my statement.

I find, however, that none of these really establishes a valid reason for an exemption. It is true that the great volume of hearings has resulted in some problems in working with the Civil Service Commission and obtaining the number of ALJ's needed, but it seems to me that this is simply a conflict between administrative agencies that can be worked out.

For the reasons stated by Mr. Keating, Mr. Matthews, and Professor Rosenblum, I believe it is just as important to apply the requirements of the Administrative Procedures Act to beneficiary hearings as to other types of hearings in Government.

I know that one severe problem caused by the volume of hearings is that more than half the ALJ's in the Federal Government are now assigned to social security cases, and if SSI is included, of course, it will be much greater than that. It seems to me that that is not a sufficient basis to make an exemption to a good policy.

I know there are fears by others who are ALJ's in the system that that the social security demand threatens to engulf the whole system. But what is in the interest of associations for ALJ's is not necessarily in the best interest of conducting social security hearings.

On a related point, I believe that the system which has developed in the Civil Service Commission for the selection of ALJ's has given too much stress to regulatory experience, and that much more thought should be given as to whether qualifications could be better directed toward experience which would fit the needs of the beneficiary hearings at least for the selection of those ALJ's who are to be assigned to the Social Security Administration.

I believe that it is now within the authority of the Civil Service Commission to develop, if necessary, a separate set of qualifications to be applied only to the ALJ's who are to hold certain types of hearings.

Finally, I would subscribe to what I think both Commissioner Ball and Commissioner Dixon mentioned, of the difficulty of applying the very subjective determinations in the disability area.

Commissioner Ball mentioned the listings, and for those cases that fit under the listings, the problem is not severe. The reason the listings cannot be applicable to all cases, however, is that for those individuals who have a very marginal vocational background, a background which is marginal even without medical impairment frequently, it would not be fair to apply the same severity of medical impairment that is applied to others.

These individuals can become disabled with a less severe medical impairment than is the case for most individuals.

It seems to me, however, that the listing principle could still be used by having a dual set of listings, one which would apply to individuals generally and another which would apply to those individuals who are determined to be in a special vocational category.

This vocational category might be determined on the basis of age, functional literacy, training skills, experience, perhaps other factors that could be determined on a more or less objective basis.

If the individual then is determined to be in the special vocational category, he is considered against the second set of listings and either he makes it on that set of listings or he doesn't make it.

It seems to me that it would be possible to work out standards which could be applied much more objectively and could therefore avoid the current situation of having the determination depend very much upon who happens to be making the determination rather than any ability to predetermine on the basis of the actual facts in the case.

Those are my primary points, Mr. Chairman. I will, of course, be glad to answer any questions.

[The prepared statement follows:]

STATEMENT PREPARED BY EDWIN YOURMAN, WASHINGTON, D.C.

SHOULD THE ADMINISTRATIVE PROCEDURE ACT BE APPLICABLE TO SOCIAL SECURITY BENEFICIARY HEARINGS?

Congress has established a policy under which most hearing adjudications are subject to the Administrative Procedure Act.[1] That Act has a long and sometimes controversial history and it contains its share of compromises. But one should resist discussing the pros and cons of the APA itself. The APA is the governing law for adjudication generally and it should apply equally to Social Security beneficiary hearings[2] unless some special situation relating to those hearings indicates the desirability of an exception.

The background material prepared by this committee's staff correctly states that the procedural requirements under the APA are not substantially greater than those imposed by constitutional due process.[3] The question here, then, is narrowed to one of desirability of the APA Provisions for the independence of the Administrative Law Judge.[4] Is there something about Social Security beneficiary hearings to justify an exception under which HEW would have greater authority in the selection, assignment, evaluation, promotion and dismissal of its employees who preside at hearings?

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[1] The Administrative Procedure Act, enacted June 11, 1946, 60 Stat. 241, and formerly in 5 U.S.C. § 1001 *et seq.*, is no longer codified in a separate division of the code. In the 1966 codification of title 5 U.S.C. its provisions were scattered among many sections of that title. The provisions most important here are 5 U.S.C. §§ 554–559, 3105, 4301(a)(E), 5335(a)(B), 5362 and 7521.

[2] The term "Social Security beneficiary hearings" is used here to include hearings for old age, survivors, and disability benefits under title II, supplemental security income benefits under title XVI and medicare benefits under part A of title XVIII of the Social Security Act.

[3] "Background Material on Social Security Hearings and Appeals" prepared by the staff of the Subcommittee on Social Security, Committee on Ways and Means, Sept. 17, 1975, p. 4. In *Hanna* v. *Larche*, 363 U.S. 420, 242 (1960) the Court stated: "* * * [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have been traditionally associated with the judicial process."

The following distinguish the Social Security hearings from most other hearings subject to the APA:

1. An extremely large volume—more than 150,000 hearings were requested and more than 120,000 cases were disposed of during fiscal year 1975.

2. The subject matter is a claim against the administrative agency for benefits rather than an effort by the administrative agency to enforce action upon a party or the assertion of a grievance by one party against another.

3. The hearings are non adversary.[5] No one appears at the hearing to advocate the denial of benefits. In more than half of the hearings the claimant is not represented by an attorney.

4. The presiding employee[6] or someone assisting him, customarily looks over the administrative file in advance of the hearing and suggests or arranges for the development of any additional facts which appear to him to be needed for a proper disposition. This may take the form of obtaining medical or vocational expert evidence through arranging for a witness or through written interrogatories. The presiding employee has responsibility to adduce evidence both favorable and adverse to the claimant.

5. Hearings are informal and brief, lasting about an hour. In the majority, only the claimant or the claimant and a member of his family appear as witnesses. The remaining evidence consists of documentary evidence from the claims file.

6. Hearings are truly brought to the area where the claimant lives and the hearing officer is stationed, perhaps with one or several others, at offices throughout the nation.

7. The hearing volume is so great that agency review is not feasible except upon a sampling basis.

Two things stand out: Large numbers of ALJs are needed—more than half of the ALJs under the APA are employed for Social Security hearings, even without considering the SSI hearing examiners; and second, the types of hearings are different than most others under the APA.

HEW, the agency responsible for providing prompt hearings, has not always had its requests for certification of additional ALJs filled by the Civil Service Commission. One may assert that the problem of providing timely hearings for these benefits and the rapid fluctuations that can occur in hearing loads justifies an exception under which HEW has greater control than is the case now under the APA. This undoubtedly would be welcomed by many whose interests are tied to adversary and regulatory hearings and who see the phenomenal growth of Social Security beneficiary hearings as engulfing what has now become the ALJ system. But if the general policy for independence of ALJs is desirable in the adjudicatory process it seems to be equally as desirable for these beneficiary, as for other types of hearings.

Perhaps I do not fully guage the red tape and the difficulties of working through another agency. If the Civil Service Commission has failed to carry out its obligation to permit HEW to maintain an ALJ staff sufficient for its needs, the Executive Branch should be able to resolve the problem without need for making an exception to the APA. The law is clear that HEW, not the Commission, determines how many ALJs are needed.[7] It should be possible to resolve this particular problem once and for all, if indeed it has not already been resolved.

No doubt there will be other problems of HEW–CSC relationships given the extraordinary number of ALJs which HEW employs. Perhaps because I do not have to deal with them, I suggest that these are only inconveniences which are preferable to the alternative of making the program agency responsible for recruiting, controlling and disciplining those who preside at hearings. Probably the program agency could and would do so without unduly threatening the independence of the individuals who conduct hearings. It might even lean over backwards so far to avoid threatening their independence that the opposite effect occurs in which there is an absence of proper and needed supervision.

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[4] While appointed by the adjudicatory agency, 5 U.S.C. § 3105, such an employee is not subject to performance rating or evaluation by that agency, §§ 430 and 5335(a)(B), and can be disciplined only through proceedings brought before the Civil Service Commission, § 7521. Selection, classification, assignment, and promotion are much more closely regulated by the Civil Service Commission than is the case for any other type of Government employee. See 5 CFR 9 30.201–.215.

[5] Occasionally two applications are made for the same benefit, e.g., mutually inconsistent claims as the spouse of a wage earner. These result in adversary proceedings but are so infrequent as to be of no consequence here.

[6] The terms "presiding employee" and "hearing examiner" used by the statute have been changed to "administrative law judge" by Civil Service Commission regulation. 5 CFR 930.203a. Presiding employee is used above to include SSI hearing examiners who have not been given the ALJ title.

[7] 5 U.S.C. § 3105.

In any event there is a danger that over the years HEW control would develop and interfer with the adjudication process. Finally, on this point, it would be unfortunate to establish a precedent which even gives the appearance that less protection from undue agency influence will be afforded in the adjudication of benefit cases than in regulatory adjudication.

The second difference—that the benefit hearings are different from others—suggests the need for a close look at the practice of requiring the same qualifying experience wherever an ALJ is to be assigned. The types of qualifying experience which are now acceptable were developed with the needs of regulatory hearings in mind. In fact the recognition of experience in the benefit area was an afterthought and is obliquely included through an example of the requirement for regulatory experience which says that beneficiary cases are to be considered "comparable" to those coming before a federal regulatory body. Experience in teaching law and writing legal opinions and serving a legislative body as member or staff counts nothing toward the qualifying experience. Nothing in the Administrative Procedure Act prevents the Civil Service Commission from adopting realistic qualification standards for ALJs who are to conduct beneficiary hearings even though those qualifications differ from what is required in the case of other ALJs.

In summary, Social Security beneficiary hearings differ greatly in volume and nature from other types of hearings covered by the APA but these differences do not justify an exception to the general policy of making adjudicatory hearings subject to APA requirements, including those to assure impartiality of decisions by ALJs.

Perhaps some day some one will come up with an innovative method which will provide more reliable decisions and provide them more quickly and more economically. Professor Dixon has advanced suggestions which might be a beginning in that search.[8] But as Dixon and, I believe, everyone else who has looked at the problem realize, to a large extent the problem is not procedural. In workers' disability benefits, the substantive test is so subjective there is at least a possibility that the next person who considers the claim will allow it. A more objective test might achieve the socially desired benefit distribution with a reduction in the number of cases that have to go to hearing.

By way of example, widows' disability is determined through medical listings with less likelihood of reversal of the initial decision. Page 26 of the background material[9] shows that less than 30% of those determinations are reversed at hearing while around 50% of disabled workers' cases, involving judgments on each individual's aptitude, skill and experience, are reversed. This does not mean that the single set of medical listings should be used for worker cases. Medical impairment alone is not determinative; vocational factors also can restrict ability to do productive work. But it should be possible to specify criteria for determining the claimant's vocational level and then apply medical listings which have been developed for that particular level. This might require legislation. If it will work it might provide a more objective basis for making determinations.

Mr. BURKE. Thank you, Mr. Yourman.

It is a custom of the committee when we have a group of panelists that we give the panelists a chance to comment on the statements of the other members of the panel.

We would appreciate it if you wouldn't exceed 5 minutes with your comments. If you have some comment to make on some statement of some other member of the panel the committee would be glad to hear it. Moreover, if you wish to support some member of the panel, we would be glad to hear that.

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[8] Robert G. Dixon, Jr., *Social Security Disability and Mass Justice: A Problem in Welfare Adjudication* (New York; Praeger, 1973).

[9] Note 3, *supra*.

First, we will hear from Mr. Abascal.

Mr. Abascal. My comment will be very brief. The basis for the differentiation that now exists in the present practice between administrative law judges, in title II cases and hearing officers, in title XVI cases is improper.

There are valid distinctions that could be made between disability and nondisability cases. The qualifications for those who hear nondisability cases could be different. But distinguishing between titles II and XVI as to the degree of independence of the hearing officer is basically distinguishing on the basis of wealth.

Generally speaking, title II claimants, are in an income position more favorable than SSI claimants. To give SSI claimants a lower quality of justice, through the lack of independence of the hearing officer, is discriminatory on the basis of wealth, a classification which I think raises a serious constitutional question.

Mr. Burke. Thank you.

Mr. Ball.

Mr. Ball. Mr. Chairman, I would like to take this opportunity to ask you something I should have asked before. That is I was trying to summarize my statement. With your permission, I would like to have the entire statement in the record.

Mr. Burke. Without objection, it will be included.

Mr. Ball. I would like to address myself to one or two points that have been made. One is the idea of time limits on the appeals process with the result that if it is not met, the individual starts to receive a benefit anyhow. This is the form of some of the bills providing time limits that I have seen. This approach seems to me to perhaps encourage a very substantial increase in the load of appeals. One has to take into account that a lot of the time it takes to decide appeals under reasonably normal circumstances depends on the action of the claimant and his representative—the submission of evidence, and so on.

We might get—I am not sure of this, but you might get under such provisions a situation in which people file appeals with the hope that it would not be settled until they got to the point where they had to be put on the rolls anyhow.

The only other point I wanted to raise is in the nature of a question, but first, I wanted to clarify one thing. It was possible that Professor Dixon misunderstood something I said. I wanted to be sure I was clear. When I was talking about the screening approach relying on the medical standards in initial adjudication and in reconsideration by the agency itself, I did not mean to imply that they stop there. This approach disposes of some 80 percent of the cases. This percentage can be decided largely on the medical standards, but for the other 20 percent, in the initial stage, the agency then proceeds to make a determination based on all the same factors that an administrative law judge would take into account.

It becomes a question of how much evidence and the question of how clear the standards are, but the initial adjudication doesn't just stop at medical evidence and leave the vocational factors, age, and so on, for later determination.

The question I wanted to ask is as follows: I had considerable hope for the precedent decisionmaking power of the commissioner at the time we started a series called "Commissioner Decisions" in the disability program where either individual cases, without identification by name, or broad policy statements were to be issued clarifying the standards, particularly those not related to the less objective nonmedical standards.

I gather that this approach has not been any kind of a success, that there has not been enough of it, it has not somehow worked.

Mr. Yourman, I think, was in the agency at the time when attempts were being made to use this approach. I wondered if he knows why it did not work, because Professor Dixon has said that additional clarification of standards is one of the big needs.

Mr. **Yourman**. I don't think I can say that I know why it doesn't work. I have a feeling that there were a couple of problems with it. I think one problem was a little bit of difficulty in getting agreement on the kind of precedent decision that would be published. That is the idea was not necessarily to publish the actual decision but to take an actual case and publish it in a way that it could become a good precedent.

To make it a good precedent the agency would build it up a little bit where it needed building up. Maybe because there were so many people in the clearance process, by the time everyone was satisfied it was rather general and did not mean very much at all in many cases.

I think there's another problem, and that is because of the great volume of cases, and because these are not adversary proceedings where you have counsel on each side to submit briefs to the administrative law judge, and to the appeals counsel if it goes before the appeals counsel, there perhaps is just no one to surface these things. This would be particularly true if you issued enough precedent decisions to cover most of the problems that occurred. Then you would have such a voluminous group of precedent decisions that it would be more difficult to find them. I think it is primarily a question of who is going to search them out and apply them.

Mr. **Ball**. That is all, Mr. Chairman.

Mr. **Dixon**. Mr. Chairman, I would like to reiterate what Commissioner Ball said and have my full statement in the record.

Mr. **Burke**. Without objection, it will be included.

Mr. **Dixon**. I have a few comments. We have many bunnies chased from under the bush and I believe there may be a tendency to chase the wrong bunny. There is the question of should there be a full allocation of SSA programs to the APA, the Administrative Procedures Act, or not. I think the APA does not help all that much. We would not solve our problem by being under the APA or by being wholly outside the APA.

I would like to try to focus our discussion a little more. First, a refresher again on the problem of standards. Because of the inadequacy of the standards, we are faced with this fact of a 50 percent reversal rate by the hearing officers.

We also have extreme inconsistencies among individual examiners, perhaps 40 percent being out of line with each other. As a result, there is no assurance that the later decision is either a better or a fairer decision. It is simply a different decision. Therefore, we can't really say that if we do not have an endless escalating series of appeals that we are creating a problem of a lower quality of justice, because a different decision which is inconsistent—and it is interesting to show there is much inconsistency—causes its own unfairness among applicants.

I think the clarification of the standards is perhaps a precondition of giving hearing examiners total independence. I think we must relate the standards question to the independence question more than has been done.

I would like to refer again to Judge Friendly's article in the Pennsylvania Law Review of 1975 at page 1289, where he was very instructive on this point. He raises the question "whether we would not be better to abandon the adversary system in certain areas of mass justice, notably in the many ramifications of the welfare system, in favor of one in which an examiner—or administrative judge if you will—with no connection with the agency would have the responsibility for developing all the pertinent facts and for making a just decision.

"Under such a model the 'judge' would assume a much more active role with respect to the course of the hearing; for example, he would examine the parties, might call his own experts if needed, request that certain types of evidence to be presented, and, if necessary, aid the parties in acquiring that evidence."

To a certain extent, the SSA works that way now and is not conventionally adversary.

Judge Friendly continues:

> Many parts of the mass justice area would be particularly suitable for such an experiment since the guidelines are sufficiently definite to avoid the danger that an outside reviewing panel may endeavor to remake agency policy.

He adds then a very important footnote, indicating we should not go in the direction, however, of total independence if the guidelines are so vague that there is a danger that an outside reviewing panel might try to negate the agency policy. That is a basic problem throughout our disability area.

My colleague, Professor Rosenblum, has mentioned we have power to improve procedure and adopt different avenues inside the APA itself. That is true. Very little has been done. If we go in that direction, though, perhaps we will simply achieve "balkanization" within the APA.

Mr. Burke. Mr. Dixon, I am sorry, we will have to interrupt you. There is a rollcall on the floor of the House. The committee is going to stand in recess until 1:30. The panel may return at that time. We will appreciate it.

[Whereupon, at 12:12 p.m., the subcommittee recessed, to reconvene at 1:30 p.m.]

Afternoon Session

Mr. Burke. I believe when we recessed that Mr. Dixon was still testifying. Do you have anything further to say?

Mr. Dixon. Perhaps we should pass on to another commentator, Mr. Chairman.

The only thing I would say in conclusion by way of final summary is that with respect to the procedure. It seems to me the due process clause, as amplified in Goldberg, requires a quite fair procedure, whether you are inside or outside the APA.

If the examiner is inside the APA, that goes to the question of independence, and that circles back to the question of abstractness of the standards.

An independent judge without a standard does become the real determiner of the actual policy, and I think we need to concern ourselves with that further.

Thank you.

Mr. BURKE. Mr. Keatinge.

Mr. KEATINGE. Mr. Chairman, I would like to ask that my statement be included in the record. I forgot to ask that it be so included before.

Mr. BURKE. Without objection, all the statements of all the panelists will be placed in the record at the appropriate place.

Mr. KEATINGE. I think it is important that the ALJ's be included. It will preserve their independence.

In talking with ALJ's in the older agencies, I find that some of them feel that social security hearing examiners or administrative law judges are not of the same caliber or quality, and do not have to handle as difficult problems as do those in the older agencies.

I do not think that as a matter of principle this is really true. I think the problems of the individual applicant under social security laws are just as important to that individual as are the multimillion-dollar claims in proceedings before the older agencies.

Therefore, it seems to me that in terms of independence, the independence of ALJ's in the social security proceedings is just as important as it is in proceedings before the Federal Trade Commission or any other agency.

But having said that, I think it also needs to be said that there may be grounds for differentiation between the two types of ALJ's in this sense, that is the qualifications, the level of competence and, quite frankly, the compensation, may not need to be or have to be of the same level.

But it seems to me that this is something more properly left to the Civil Service Commission in its determination as to what the exact GS level is at which these gentlemen ought to enter the government service. But that does not have anything to do with their independence. No matter what kind of case they handle, whether it is at the FTC or the Social Security Administration, they should have the independence that comes from being appointed and removed by the Civil Service Commission, independently of the agency itself.

Secondly, I would like to make a few practical comments from having participated in a few social security cases recently. I took the liberty of taking files away from one of our associates.

All of these gentlemen appearing this morning are or have been involved directly or indirectly, with one or another agency, and I hesitate to say this, but perhaps somebody should say it. I get the feeling that as yet modern administrative concepts have not completely permeated the Social Security Administration.

I get the feeling that the intensive use of paralegal assistance such as we have to use in law firms to keep the cost of litigation down, has not yet reached the Social Security Administration.

It seems to me that what is needed, as a practical matter in the Administration, is better management of the files and the caseload.

With respect to the Administration's large caseload, I read what Commissioner Cardwell said last week. I think the agency is going in the right direction, but I think it needs to do more. I think the files need to be better organized, and I think there should be more face-to-face consultation with the claimants before the cases have to go to an

ALJ. I think there are many things the agency can do itself independently to eliminate a number of these problems from a management point of view.

Furthermore, I have to agree with Mr. Dixon with respect to standards. Any time you have a 50-percent reversal rate, which is what you have now in the cases that go up, something is wrong. As a trial lawyer, it strikes me that the something that is wrong is that there are no standards.

Assuming that these gentlemen who are now presently ALJ's are competent, then how can you justify a 50-percent reversal rate?

The only way you can justify it or explain it, as I see it, is that there are not sufficient standards, and it seems to me it is incumbent upon the agency to develop the standards and put them out in the form of precedent decisions; I understand they are going to publish an internal law journal which will contain those types of decisions. Such a procedure seems to me something we need to cut down the field load and the reversal rate.

Thank you, Mr. Chairman.

Mr. BURKE. Thank you. Mr. Matthews?

Mr. MATTHEWS. Thank you. I would like to endorse fully what my friend, Mr. Keatinge, said. I think there should be a little different alinement in working operations.

For example, the development centers probably should be brought more closely to the administrative law judges. As I said earlier in my direct testimony, the Appeals Council should become more of a policy-type organization rather than handling cases on a case-by-case basis.

It seems to me that this is a large group of people to be utilized in fanning out precedent-type cases, or novel cases, and giving the 400 ALJ's an opportunity to see what agency is thinking about in terms of policy, and law, possibly.

Secondly, I was acquainted somewhat with 8911. I would like to endorse 8911, not in toto, but in its thoughts. I would suggest rather than make the ALJ's in SSI program, making them temporary, that the committee would be well thought to make them permanent in the BHA.

No harm would be done in making them permanent. As I understand the bill, it runs through about 1978 for temporaries. By 1978 I would daresay that probably 200 to 300 of the present ALJ's in BPH will be ready for retirement.

Secondly, that group, and there are about 210 to draw from; namely, the SSI and the black lung ones. Speaking of the black lung, we haven't done that today here yet, but I would hope this committee would take the opportunity to bring the temporary ALJ's into the full operation ALJ program in BHA, so that the BHA can rotate cases, not only title II, but also the black lung and, too, the title 16 of SSI.

This way, I think the BHA would break its workload very, very quickly, and I again want to endorse what my friend, Mr. Keatinge, said, and I think the agency should have, and badly needs, administrative law judges throughout its programs. They will be well-received by the legal profession and by the American public.

Thank you very kindly.

Mr. BURKE. Mr. Rosenblum.

Mr. **Rosenblum.** Taking the statement of my good friend Bob Dixon, I think that really being under the APA does make a difference, and that it does help in respects in addition to those that Dick Keatinge mentioned.

In addition to the certainty and confidence that comes to the outsider and to the claimant about the independence and integrity of the administrative law judge when the APA applies, I think you also have a sense of that integrity that is understood by a reviewing Federal judge as well.

I think that the study that I have done for the administrative conference—and I am speaking for myself and not for the conference or any of its members—shows a growing tendency on the part of the Federal judiciary to recognize the centrality of the role of the administrative law judge. I don't think that that would happen if the hearing officer were merely an appendage of the agency and depended upon the agency for his advancement and promotion.

In cases such as the 1974 court of appeals decision in Brennan against Gilles and Cotting, the courts have ruled that an agency had the obligation when it wished to reverse a decision of the administrative law judge to explain the grounds for their rejection of the administrative law judge's disposition of the case.

I think that part of the reason for the court's insistence upon a rational explanation for the reversal of the ALJ is precisely the court judge's sense of the integrity of the ALJ.

Indeed, Judge Friendly himself in a decision last year in *Brennan* v. *John J. Gordon Company* supported an ALJ's ruling on reopening the record against an adverse ruling by the Occupational Safety and Health Review Commission, with Judge Friendly pointing out that it was not only appropriate but necessary for the ALJ to reopen the record in this case. Again, I wonder if there would have been that sense of confidence if he were not dealing with ALJ's of integrity which he could recognize.

Mr. **Burke.** We have a rollcall. We will recess and come right back.

[A recess was taken.]

Mr. **Burke.** The subcommittee will be in order.

Mr. Yourman, you are recognized.

Mr. **Yourman.** Mr. Chairman, I have no further comments.

Mr. **Archer.** Mr. Chairman, I have a few questions.

You recommended federalization of State disability determination agencies, but I really have got to wonder whether the Social Security Administration has the capacity to assume this added burden.

I ask this particularly in light of what is happening in the administration of the SSI where we see now they report $800 million in payments that were made erroneously, and this sort of thing, and we hear a great deal in the way of comments from the Social Security Administration, and they are terribly overburdened and have great difficulty in just digesting what they already have.

I wonder if you would comment on that.

Mr. **Ball.** Mr. Archer, the thought I would have would be that it would be simple for the Social Security Administration, because it is not a question of substituting for the existing State disability determination units. What I was proposing was that you would blanket into the Federal service the people who are already in the State units. They are in separate units, almost always. A social security disability determination unit's employees would become Federal employees. Two main differences would make things, I think, easier for social security. They now have to negotiate a lot of matters through a State agency on questions like overtime, or staffing and that sort of thing. Making the agencies a direct part of their own operation in that respect would be easier.

Also you could use the staff more flexibly when population centers cross State lines, or where population is spread out in parts of the country. You would staff differently if you had it on a Federal basis.

I don't see it as an additional burden, I see it as a help.

Mr. ARCHER. I still can't see how you can do a great deal in face-to-face negotiations with respect to determinations, if you federalize it. If you have sparse population, the fact that the Federal Government is running it doesn't make it any easier to get a person to a population center than if the States are running it.

Mr. BALL. The only point I wanted to make on that is that the way things are now, very commonly, the State disability determination unit, even in fairly sizeable States, may all be centralized in a single office, just because they are looking only at paper. You would have to reorganize them quite substantially for this face-to-face operation, an operation which I think would be a good improvement.

Mr. ARCHER. In that event, you would have to do more, wouldn't you, than just absorb the State personnel into the Federal system? You would have a complete reorganization system administratively; would you not?

Mr. BALL. I would absorb that personnel, and. you are quite right, that wouldn't be the end of it. You would have to have some relocation in addition. I agree.

Mr. ARCHER. Mr. Dixon, have you spelled out for the committee, and if you have I was not here when you did it, what statutory standards in disability you would recommend in specific words? I know you recommended that we change the statutory standard for disability, and I am curious whether you have a recommendation that is specific.

Mr. DIXON. I perceive a problem with respect to the stautory standards. I do not have a solution to the problem readily at hand.

I think there is a three-step process, perhaps. One, the easy way to try to achieve clarification is by the precedent process, which requires publishing, say, appeals and decisions and letting the common law case-by-case process take over.

The rulings they do give out, a santized version of a case, are not helpful enough because they are too infrequent. The next step would be to try overt rulemaking by the Secretary himself to try to make the standards more clear.

A third step would be to attempt to clarify the statute itself, and I think that may be impossible to do unless hard choices are made as to whether or not the program is to be in an absolute sense a total disability program, or whether if a person is out of a job in one area, he is eligible for a "disability" award although there might be jobs elsewhere.

I think there was a hardnosed attitude in Congress when this was passed I think regional factors have turned it into an occupational disability concept. I suggest you study it, but I have not the expertise to give you new language.

Mr. **Archer**. Since this is one of your three recommendations there, it would help if we had something to go on.

Mr. **Dixon**. May I add one other thought, then? In my written statement, I suggested that there may now be an incipient equal protection of the laws problem, a constitutional problem, insofar as it may work out that if a person has a trauma in one area of the country he may get disability, whereas an equivalent trauma in another part of the country where there are more jobs available of a simple type would not yield a disability award.

There may be a differential treatment on a national basis, and that is one problem that strikes me as being worthy of attention. That is, whether we have a national standard or regional standard, and if it is regional only, are there constitutional problems? There may be.

Mr. **Archer**. The recommendations from some of you are that we move toward federalization. I would suggest that as we federalize a greater part of this, we would see, of course, more volume in the Federal agency involved in administration, which it seems to me is going to pose additional problems. I know most of you, if not all of you are opposed to any further process other than the APA applying to the problem, but I thought Mr. Yourman made some excellent points as to the distinctions between this and other administrative procedures and then turned around and said that even though these distinctions exist there is no reason to create a new system.

I was rather struck by some of his distinctions, and I would like to ask you gentlemen this question: If you were starting from scratch with the social security problem, the one we are dealing with today in hearings and in these evaluations, could you design a different system that would be more effective from the standpoint of equity and justice for the recipient and also equity and justice for the taxpayer, or would you use basically what we have got today?

Mr. **Burke**. We will have to go over and answer another rollcall. I think after we answer this one, we can find out whether we will have to transfer the hearings to H-208 or not. If this is going to be the last rollcall, we will continue on here. We will know when we come back.

[A recess was taken.]

Mr. **Burke**. The subcommittee will be in order.

Mr. Steiger, do you have any questions?

Mr. **Steiger**. We were anxiously awaiting the answer to Bill Archer's thought-provoking questions. Let's ask Mr. Rosenblum if he is ready to answer the question.

Do you remember the question?

Mr. **Rosenblum**. If we had it to do over again, what would we do?

If I had to approach it in the terms of would I federalize or not if I had it to do over again, my answer would be a categorical "no federalization."

That is to say, I think the history of social security was designed to be, and for a long time it really was, a model. The Supreme Court's decision approving it in the *Steward Machine Co.* v. *Davis* case, now almost 40 years ago, a model as well. In the course of that decision, Mr. Justice Cardozo spoke about the importance of cooperative federalism, and I think cooperative federalism is indeed a uniquely democratic device for achieving the best that the Federal Government and the States have to offer through cooperative activities between those two vital cogs in our country's machinery.

I think that to move away from that, and to federalize as a matter of principle would be a mistake. The development of standards that can be utilized with great degrees of similarity on a State-by-State basis with help from Federal agencies and other public service groups, I think, is the sort of thing that we ought to continue to strive for.

The development of educational programs, in which officials responsible for enforcement of social security programs in their States would be expected to participate, could be conducted under the auspices of such organizations as the Civil Service Commission and the American Bar Association's Center for Administrative Justice. There could go a long way toward achieving without coercion the establishment of standards that would be largely uniform, without having somebody standing there with a fist or without imposing coordination from an all-powerful central source.

So, in that respect, I would say no federalization.

With regard to the procedural dimension, I think it ought to work today as it was intended to work at the time it was established. We sometimes lose sight of the fact that the Administrative Procedures Act itself was modeled in some ways on the procedures of the Social Security Act, and this was recognized by the Attorney General when he prepared the manual on the Administrative Procedure Act.

So, I would think that the history and tradition of social security, have been wise both in terms of cooperative federalism and in terms of the procedures established that became a basis for the APA.

I guess one real problem that I have some concern about is the magnitude of the money involved. If one were dealing anew with the subject today, I think it would be important to seek some correlation between the kind of standards we establish and the amount of money that we are capable of providing for the administration of the program.

Mr. **Burke**. Mr. Archer, Mr. Steiger asked him to proceed to answer your question.

Mr. **Archer**. Would anyone else on the panel like to comment or make any other observation on my question?

Mr. Dixon?

Mr. **Dixon**. A comment on the comment that my friend, Mr. Rosenblum made, his plan for federalism—if we are dealing with a program based on a concept of legal right, then I would have a problem, because a legal right requires uniformity. I think maybe from my standpoint, I would turn it upside down.

If you have a pretty clear concept of a legal right, that is, a standard, then you can decentralize the administration and gain benefits and have a cooperative Federal-State relationship, but if you do not have a clear-cut standard, and you decentralize the administration nevertheless, you expect too much, I think, if you expect the decentralized administration to evolve national standards.

Mr. **Archer**. Does each one of you agree that we ought to put all this, including SSI, under APA? Is there anyone who disagrees with that?

Mr. **Dixon**. I have reservations about it at the present time, as I explained earlier, putting the disability determinations under the APA all the way in terms of the status of the hearing examiner.

Procedurally, the due process requirements are fairly stringent and the procedure is good. I tend to share the fear of Judge Friendly in the article I quoted from, that Congress would lose control of this rather large area of expenditure, the administration would lose control of it. An independent body of hearing officers would be reviewed only by the district courts.

Mr. **Archer.** It was testified to our committee the other day that they weren't able to fill a lot of their ALJ positions, particularly in less desirable locations, and they cannot get qualified people to go into those less desirable locations.

Does any one of you gentlemen have a suggestion as to how we fill those spots? I don't see how we could get the backlog down unless we have adequate and qualified personnel.

Mr. **Keatinge.** I would like to respond to that question if I could.

I think qualified personnel are available. There are qualified lawyers available today probably in greater quantity than they have been for some time; perhaps it is because of the economic situation we find ourselves in, but it is a fact.

I think, also, from having had experiences with the Civil Service Commission in supplying Bar Association members of panels for recruiting of those ALJ's in the past, that the Civil Service Commission has not made—has not extended, shall we say—the maximum effort it should have extended in soliciting and trying to obtain additional people for hearing examiner ALJ positions.

In the social security field, there are positions in many areas of the country. There are a few areas where they perhaps could not be, simply because of the compensation level that is paid to these people. This is a problem even for Federal district judges, as I am sure you gentlemen know. The Federal district judge in New York City has a very hard time, whereas in Wyoming he can get along well on the compensation he receives.

This is a problem that I don't think is going to cure itself without adjusting the levels of compensation, regardless of what these officials are called and by whom they are hired; the compensation levels will need to be raised to where they are reasonably competitive.

Mr. **Archer.** Isn't this another problem with federalization that we end up with a standard salary across the nation rather than the flexible salaries that vary from region to region, where you have state administration?

Mr. **Keatinge.** I would agree completely, sir. I remarked to somebody during one of the recesses that I thought being an administrative law judge in Sheridan, Wyo., would be desirable from a compensation standpoint, whereas in New York City it would not be.

Mr. **Archer.** When we talk about federalization, it sounds beautiful, but there are a lot of problems incumbent in that. Thank you, Mr. Chairman.

Mr. **Burke.** Mr. Steiger?

Mr. **Steiger.** Thank you, Mr. Chairman.

Professor Dixon, you have to go to catch a plane, and before you leave, I would want to make one comment, and ask you a question.

I don't know if you had a chance to read Mr. Dullea's testimony from last week.

Mr. **Dixon.** Unfortunately not, although I respect the man immensely.

Mr. **Steiger**. I hope you will have the opportunity, but in his testimony, he indicated there is only one possible determination of section 1631(d)(2) and that the Civil Service Commission and the Department of Justice fully subscribe to that determination.

I would like to ask whether it would be fair to call that an overstatement of the opinion you rendered on this subject 2 years ago?

As I recall your opinion, you said that, yes, there were policy reasons for what the Civil Service Commission did, but solely on legal grounds, it is obvious that it would be safest to act on the assumption that 1631(d)(2) only allows the Secretary to bypass "under the circumstances stated."

I thought you asked this be submited to Congress for some clarification. Would you comment?

Mr. **Dixon**. I would comment in this way: I would, I believe, stand on what was said in the document you referred to 2 years ago when I was serving as Assistant Attorney General, and my recollection is that on the legal question, our conclusion was that there was an ambiguity in the statue, and the legislative history. There also was language about power of the Secretary of HEW, after making a certain finding of need, to appoint hearing examiners outside the APA-Civil Service process, and our conclusion was that given the ambeguity and that exception clause, he had power to go either way.

The Civil Service Commission, I believe, was pleased that we did not say that the Secretary had no power to appoint outside the APA. Others were displeased that we did not say that he had power to appoint only through the APA.

We had said, in effect, that given the conditions, he had power to appoint and conduct hearings without using the APA certification process.

Mr. **Steiger**. I hope you will have a chance to read the statement, and as a matter of fact, staff will be sure you get it, so if you have any further comments on it, I would be grateful.

Mr. **Dixon**. I will read what I said 2 years ago, and also that document.

Mr. **Steiger**. I think we owe this panel a great debt of gratitude. They must be the longest running panel in the recent history of the House. I don't remember quite having had the kind of interruptions that we have had, and I therefore will not go into questions that I would like to, because of your time constraints and ours. But I am deeply grateful to you.

Mr. **Burke**. Are there any further questions?

On behalf of the committee, we wish to thank the entire panel for your appearance and your contribution. You have been very patient, as Mr. Steiger pointed out. We regret the interruptions.

Thank you for your appearances.

Mr. **Dixon**. Thank you.

Mr. **Burke**. Our next group is a joint appearance of four witnesses, a distinguished former colleague of ours, Mr. Albert Watson, president, Association of HEW Administrative Law Judges, Columbia, S.C.; Morris H. Kross, president, Association of SSI Hearing Examiners, Kansas City, Mo.; Jack R. Reed, chairman, Black Lung Administrative Law Judges Association, Knoxville, Tenn.; and William

Fauver, President, Federal Administrative Law Judges Conference, Arlington, Va.

We welcome the committee. Once we get your name plates in place, we will proceed.

A PANEL CONSISTING OF ALBERT W. WATSON, PRESIDENT, ASSOCIATION OF HEW ADMINISTRATIVE LAW JUDGES, COLUMBIA, S.C.; MORRIS H. KROSS, PRESIDENT, ASSOCIATION OF SSI HEARING EXAMINERS, KANSAS CITY, MO.; JACK R. REED, CHAIRMAN, BLACK LUNG ADMINISTRATIVE LAW JUDGES ASSOCIATION, KNOXVILLE, TENN.; AND WILLIAM FAUVER, PRESIDENT, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, ARLINGTON, VA.

Mr. Burke. I think we will go in the order that you appear on our schedule. We will hear first from our former colleague whom we welcome back to Washington.

We recognize, you, Mr. Watson.

STATEMENT OF HON. ALBERT W. WATSON

Mr. Watson. Thank you, Mr. Chairman, and members of the subcommittee. Let me say that I appreciate your position, and the problem of the mental exercise that you have to go through, but additionally the physical exercise that you have had in running back and forth trying to meet the various rollcalls that you have tried to meet since we commenced the proceedings here this morning.

While I shall always cherish the honor of serving in your august body for 8 years, I deeply appreicate this opportunity to appear before you and give you the benefit of my experience as an administrative law judge for the past 3 years and, more specifically, testify as president of the Administrative Law Judges' Assoication in the Department of Health, Education, and Welfare. In preparation for this hearing, I studied your staff reoprt on the problem before us, and let me commend them for an exceptionally fine work which is well researched and reflects a most comprehensive knowledge of the hearings and appeals process.

Let me say initially that, although we administrative law judges are naturally concerned about our own personal welfare, I sincerely believe that any selfish interest in this particular matter has been subordinated to the overall best interests of the claimant and individual citizen whom both of us seek to serve. Also, I would be less than candid if I did not say that I have some reservations about some of the provisions of the various pieces of legislation before your committee, even H.R. 8018 which our Association strongly supports. In that regard, I personally thought that some of the provisions of this particular piece of legislation were more properly subjects of administrative regulation and policy rather than legislation; but, quite frankly, it appears that accomplishment of these changes is very difficult administratively. While initiatives have been taken to effectuate some of the objectives of this bill, we still urge your favorable consideration of it.

First, let me say that while some, for reasons best known to themselves, persist in questioning the APA status of the hearings being conducted by the administrative law judges in the Department of HEW, I shall not infringe upon your time nor insult your intelligence by dwelling at length on that issue. You have heard an eloquent discussion on that by the professors here who preceded us. Suffice it to say that in the passage of the Administrative Procedure Act itself in 1946 Congress specifically provided that all agencies not expressly exempted are covered, and nowhere have those who question the applicability of the APA to SSA and SSI cases cited any legislative exemption whatsoever.

Even were that provision of law not clear enough, it has been reinforced by your committee which has reaffirmed that coverage in both committee reports and in the legislative history on the bills. Additionally, the Attorney General's Manual of 1947 made it very clear that we were included in the provisions of the Administrative Procedure Act. Therefore, I would never be so bold as to question either your intent or your wisdom in the inclusion of our proceedings under the Administrative Procedure Act, and I know that you will require definitive authority and justification from those who would exclude us. While I have no doubts, specific language in one of the bills would put that issue to rest once and for all.

Furthermore, may I respectfully suggest that, while some have recommended the use of non-APA-certified administrative law judges as advantageous from either a managerial or a strictly dispositive standpoint, they disregard the guarantees of the APA. Certainly their recommendation is not tempered with the common bond a Congressman and an administrative law judge share; namely, a vis-a-vis relationship with the claimant. We both face the claimant directly, you in the election process and we in the hearing and decisional process. Therefore, others, regardless of how well intentioned, may theorize on solutions from an administrative or managerial standpoint, but only you and we have been in the trenches, so to speak, and most importantly, only you and we must return to face the flak from the action taken in this matter. No doubt, using non-APA-certified judges would increase production, as would the use of a clerk in a mass justice assembly line scheme. However, assembly line justice is not justice, and both the law and equity demand a full APA hearing with an APA judge. We should all remember that there is only one thing worse than justice delayed and that is justice denied.

Another important point will be considered by you, I know. Since our claimants are individual citizens, unorganized and often uneducated, their right to have their case heard by a fully independent administrative law judge, duly qualified under the Administrative Procedure Act, could be compromised or perhaps even denied altogether without the protest one would ordinarily expect from well organized and financed corporate interests faced with the same prospect. But these citizens deserve just as fair a hearing, with ALJ's just as qualified, as any corporation, and I know you gentlemen well enough to believe that you will insure that the individual claimants receive no less, despite their lack of organization and resources. With the passage of the Administrative Procedure Act in 1946, the Congress wisely ended the era of the agency-controlled circuit rider with his Washington-dictated decision, and I know Congressmen of your dedication will not permit a return of any system—be it only temporary—which would deprive the individual of those rights which are accorded a corporation under the APA. That some would suggest a distinction because of the dollar value difference is unconscionable. Although the projected monetary value of a social security disability case is in excess of $50,000, who is to say that even a $250 monthly payment to a claimant to sustain his family is not equal in importance to the thousands at stake for a corporation.

In appealing to you gentlemen to refrain from taking any action which would do irreparable violence to the APA, and more importantly, would compromise the rights of the individual American claiming benefits under social security, may I add that we ALJ's feel the direct impact of the current delays being encountered in the decisional process much more dramatically than anyone other than you and the claimant. The claimant is no statistic to us; he is an individual, and he is generally an individual in need. While we lack the direct continuing contact with them as you who serve them in the Halls of Congress, we do face the claimant personally in the hearing and indirectly in the decisional process. Our sensitivities to their problems and needs are certainly more intimate and personal than some of those who today are advocating a compromise in the hearing process with less than fully qualified administrative law judges to conduct the hearing and render the decision. We face the claimant; we hear his testimony and that of his supporting witnesses, and then we wrestle with a decision in the light of the law and regulations. Certainly these direct pressures upon us are far greater and make us more sensitive to the claimant's best interests than the pressures on those who sit in an administrative capacity and are therefore insulated from the claimant. In making that statement, we are not finding fault with anyone, but are merely setting forth our respective vantage points in an effort to assist you in an equitable resolution of this problem. We ALJ's are deeply concerned, as you are deeply concerned, with the problems of management. But at the same time we are unapologetic in saying that our paramount concern is the preservation of the rights of the individual claimant under the Administrative Procedure Act. To do otherwise than support that preservation would be a dereliction of our responsibility under the law, a breach of our oaths of office as administrative law judges, and most importantly, a callous disregard for the rights of our fellow citizens.

Well do I realize that you have manifold problems confronting you, of which this is only one, and in the minds of some perhaps one of the less important ones. Nevertheless, let me say that I personally have labored long and hard over this problem, earnestly trying to project myself into your position inasmuch as I was honored to serve with you for some 8 years.

Mr. **Burke.** I do not want to interrupt you, Mr. Watson, but this is a regular quorum call, so I think for the convenience of the rest of the hearing, we will transfer the hearing to H–208 so we will be able to vote on the House floor. It will not take us so long to go back and forth.

[Whereupon, the hearing was recessed, to reconvene in room H–208, the Capitol.]

Mr. Burke. The subcommittee will come to order.

Mr. Watson, you may proceed.

Mr. Watson. I will continue with my statement. Despite protestations from many ALJ's, I honestly believe that our responsibility as administrative law judges is not just to oppose the proposed granting of temporary authority as contained in H.R. 8911, which we believe would be a diminution and erosion of the hearing process for individual Americans, but frankly, to support alternatives in the light of our experiences. Since I earlier contended that we regular ALJ's are in the best position to know the hearing problems confronting all SSA claimants, its naturally follows that we should be in the best position to recommend reasonable solutions. In that regard, we support H.R. 8018 and companion bills which were authored initially by Congressman Sisk.

As stated earlier, I would not be so presumptive as to suggest that this is a perfect solution, but this legislation does provide for a reduction in the time frame within which hearings will be held, give the claimant the factual and legal basis upon which his claim is denied, set forth reasonable grounds for basing an appeal, at the least, it provides a basic framework upon which you and your committee staff can formulate final legislation. Furthermore, it provides for parity of pay for all ALJ's appointed under the APA. I say without reservation that those ALJ's who conduct the hearings and, indeed, decide the well-being of individual Americans, are personally entitled to the same pay as those who decide corporate matters. This is particularly true in light of the equities of the matter, the difficulties of the various jobs, and the fact that all ALJ's must meet the same qualifications of written and oral examination and legal experience. There is no legal or equitable justification for the difference in pay, and to perpetuate the present inequity of salary, despite precisely the same qualifications, is not so much an insult to the ALJ as to the claimant, which certainly was never intended by the Congress.

The question was raised earlier about why we were unable to get ALJ's insert areas. We lose ALJ's every day from our agency to other agencies that offer them GS-16's, so we are unable to compete.

Also, I would underscore that this request is made of you on the basis of fairness and equity.

As I reiterate and underscore our opposition to the enactment of section 3 of H.R. 8911, the temporary appointment provisions of that bill, may I add that, even if this bill should be passed, it would still not obviate the need for passage of H.R. 8018. They are not mutually exclusive. May I strongly suggest that should you decide to move forward with H.R. 8911, and without deletion of section 3 thereof, that you could somewhat vitiate the adverse impact of that legislation by incorporating therein the provisions of H.R. 8018. To do otherwise, in my humble judgment, would indicate a subordination of equity to expediency and, more importantly, would be construed as placing a higher value on corporate rights than on individual rights—neither of which any of you desire or would consciously permit.

Might I say that there is no argument between our association and other associations of hearing examiners. Frankly, we are all trying to do the same job. So far as we are concerned, those who may have suggested that we are trying to keep our ranks exclusive, we have advocated additional judges, we have urged the appointment of additional judges, but we do insist that the appointments be in accordance with the Administrative Procedure Act. We believe this is the heart of APA, as Congress itself stated when it passed the act.

Many hearing officers are able men, and we have urged them to apply for regular appointment under section 3105 of the Administrative Procedure Act. That they seek promotion to the status and salary of a fully qualified ALJ, without undergoing the rigors or requirements of the regular appointment process as established by the Civil Service Commission, is understandable. But at the same time their interests must not subordinate the interests of the claimant by compromising the appointment process. Those who advocate the temporary appointment process refer to a similar authority in 1959 as a precedent for such action, but it should be recalled that your committee at that time, in its wisdom, warned in clear and unmistakable language that the administration should not seek such temporary authority again. Additionally, I have been advised that many of the SSI hearing examiners have more than adequate caseloads to keep them busy in the foreseeable future, and apparently a need for even more hearing examiners is indicated by the fact that only last month a new class of hearing examiners was completed.

I will not bother you with figures, but we must remember that we have some 17,000 pure and simple SSI cases now to be heard, some more coming in every day, and we have only 124 SSI hearing examiners on the Board. Assuming such to be true, then these hearing officers should continue in their assigned capacity with title XVI cases, and those who do not have sufficient workloads could be utilized very effectively in assisting regular ALJ's in the development of cases and the preparation of decisions. Such utilization of black lung judges has been made before and the Director of the ALJ Division of the Civil Service Commission advises that it would be qualifying experience for subsequent appointment as a regular ALJ. Furthermore, until they qualify as APA, ALJ's all hearing examiners and black lung judges should be classified as GS-14. You can give me all the safeguards, but if you do not give me an independent hearing officer, you have robbed me of the heart of the Administrative Procedure Act.

I believe all who have testified and will testify concerning this problem will agree that adequate time for the conducting of hearings is not the primary reason for the present backlog of cases. The real problem is due, first, to inadequate prehearing development which delays the scheduling of the hearing and, second, to the time required to write the decision, two areas in which the SSI hearing examiners could be of immeasurable assistance in view of their experience.

As I conclude, may I add that we ALJ's are redoubling our efforts within the parameters of theAPA to expedite cases without compromising the fairness of the hearing and the integrity of the decision. Also, while more remains to be done, let we congratulate the present Director of BHA for the initiatives he has taken to improve prehearing development, to allow informal remands, to reduce delays encountered by the appeals council's own-motion review of favorable decisions and to implement the law clerk and legal assistant program, the assignment of analysis to the hearing office, and the addition of other supporting personnel. Although in effect for only a few months, these steps have already proved of substantial help in reducing caseloads daily.

I submit that the actions we have recommended provide for an expeditious, orderly, and fair solution to the backlog problem. Most importantly, these actions afford no compromise of the rights and protections guaranteed under the Administrative Procedure Act.

Gentlemen, may I interject parenthetically here in the midst of all this crisis, and we feel it keenly, as all of you gentlemen do, I think it is a compliment to the ALJ's that we have not panicked. We are still trying to give the claimant a full hearing and protect all his rights under the APA, despite the pressures that may be asserted from a great many sources.

Also let me say that while much remains to be done, and there are other things that need to be done, let me congratulate the present Director of the Bureau for the initiatives he has taken to improve hearing procedures. Much action has been taken in the last nine months.

Gentlemen, this has been a delaying factor. After we ALJ's render a decision, oftentimes, the appeals council will review it on an own-motion review. The present Director has eliminated that, and I handed down a decision on August 3, and instead of the claimant waiting another 2 months to get the check, on August 25, the claimant had his check for all of the back payments. This is a step that expedites the receipt of payments.

Additionally, the Director has instituted the law clerk and legal assistants program. We have 170 law clerks on board now, and I understand we will have an additional 100 or so. This is a new program, just a matter of 2 months ago. The increased production has gone up better than 50 percent in many of our offices, purely because of the institution of this program.

Mr. **Burke**. If you will hold up right there, Mr. Watson, we will be right back. It is another rollcall.

[A recess was taken.]

Mr. **Burke**. You are recognized again, Mr. Watson.

Mr. **Watson**. Mr. Chairman, let me conclude by saying that, as I mentioned earlier, that the steps that have been taken and the initiatives by the director, they have already proven to be immeasurable help in reducing the backlog, and actually they have not been tried that long to reach their maximum potential, and I think, as stated here, they are a help in reducing the backlog of cases that multiply daily.

The actions that we recommended I think make for an expeditious solution to the backlog problem.

Most importantly, and we urge you to remember this, that while these procedures do provide for an acceleration and the effort to reduce the backlog, they at no time provide for a compromise of the rights guaranteed under the Administrative Procedure Act.

Thank you.

Mr. **Burke**. Thank you, Mr. Watson.

Our next panelist is Mr. Kross. You are recognized Mr. Kross.

STATEMENT OF MORRIS H. KROSS

Mr. **Kross**. I hope my voice does not crack. I apologize for the fact that I suffer a slight head cold on top of an annual bout of Midwest hay fever right now.

Mr. **Burke**. If you wish, your entire statement will appear in the record.

Mr. **Kross**. Mr. Chairman, I was going to ask that the statement I submitted appear in the record.

I would like to proceed quickly to a couple of points here. It appears to me, Mr. Chairman, that the Bureau of Hearing Appeals of the Social Security Administration is faced with an ongoing problem of a tremendous number of requests for hearings which will not be adequately handled with the current staff available, with the current number of judges available.

A lot of these have been suggested here at these hearings today that involve long-range planning and projects, and perhaps in the future reduce the load of request for hearings in the Bureau of Hearings and Appeals.

I suggest, Mr. Chairman, that the immediate problem of 170,000 people as of this month and 154,000 more people between today and this time next year are getting requests for hearings and getting them timely—Mr. Chairman, it is the considered opinion and testimony of the people who know best, that is the Commissioner of Social Security, the Director of the Bureau of Hearing Appeals, your committee staff, who are as familiar with the problem as anybody, and members of this committee as well, that that job, with all the management procedures now being taken under the new Director of the Bureau of Hearing Appeals, that job cannot be accomplished without a significant and substantial number of new judges. The Bureau determined this year that they needed 150 new judges this year, and they know that in the next 3 years, 248 of the current administrative law judges will be eligible for retirement. Mr. Chairman, that is 400 judges that the Bureau needs in a 3-year period, in their best judgment, to catch up with the backlog and maintain a current rate of disposition on requests for hearings.

The question, Mr. Chairman, it seems to me, is what is the best and most reasonable, logical, and best way, not for judges, not for hearing examiners, not for the Congress, not for the Bureau, and not for Social Security, but what is the best way to give these claimants a fast and fair hearing with full justice?

Mr. Chairman, I suggest that you have got to give them the APA. I suggest, Mr. Chairman, that every judge who hears any kind of social security case, including SSI, needs an APA judge, because it is the only system we have in the Federal Government today outside the Federal courts that gives them—where the judge is independent of the agency. The question is: Where do you get them? The Civil Service Commission came up with a certificate of eligibles, and they got 43. They are hoping to have a class of 56 in January. They do not know if they are going to get that many or not, because they are just beginning to work with the certificate of eligibles that the Civil Service Commission made available, as I understand, just within the last week or 2 weeks.

Mr. Chairman, a class of 43 judges was appointed this last June, according to Commissioner Cardwell, and he is short, I think, when he says that it takes 9 months from the day of appointment until that judge is producing. Those 43 judges will not be producing until next spring. The 56 we are talking about in January are not going to be producing a full load until this time next year.

Mr. Chairman, you have on the job right now 124 SSI hearing examiners who are on the job, in place, have section, have hearing assistants, have office space, have staff, and are ready and willing to, within 24 hours or less, the day the President signs into law a bill that is effective the day he signs it, that next morning he has 124 hearing examiners on board to become ALJ's, and go to work hearing and deciding cases.

Yes, there is an SSI workload, but not enough to keep almost any of the hearing examiners busy, because the fact of the matter is that SSI examiners today do not have a full workload. They cannot have, because 60 percent of the SSI cases Mr. Watson talked about are concurrent with title II. They cannot hear them right now, because they are not APA judges.

The question is should they be appointed, or be made title II judges as if they had been appointed under 3105 without first qualifying under the civil service register?

Nobody has used that, because it is a bad term in Government, Mr. Chairman, but to be frank, it is grandfathered in. That is a term we don't like in Government, because it is only done when circumstances and exigencies are such that it compels it, and there is good reason for doing it.

Now, I suggest to you, Mr. Chairman, that the man who has no ax to grind, and who knows as much about qualifications as SSI hearing examiners as anybody who will appear before you in this hearing is Mr. Wilson Mathews, and he has no ax to grind, and he made it clear, and I alluded to it in my statement, and am not going to go into it now, that on any basis you want to take it, examination, qualification, qualifying experience, SSI hearing examiners have first shown that they have the substance of qualifying experience that is shown by a man when he applies for appointment before the register under 3105.

Perhaps there is something more important, Mr. Chairman, and I don't like to be personal in hearings like this, but I will at this time.

I am on the GS 15 and 16 register as a result of 15 years of private trial practice in my hometown of Kansas City. They have me on the 15 and 16 registers.

I say to you, Mr. Chairman, that I was a typical private practitioner. I never had a case before social security in 15 years of practice, and this is true of virtually all lawyers, with few exceptions, who end up getting on the civil service register.

I say to you, Mr. Chairman, that not after a year, but after 6 months of experiences of hearing SSI cases, which are the exact same law as title II, and they are disability cases, and I say to you that I am a lot more expert than the 15 years of private practice ever made me, and that is what got me on the civil service register.

I say, Mr. Chairman, if you want an answer to the current problem, it is right here at hand, and it is simple, and it is not 8911 that makes permanent judges out of them.

What does a Member of Congress say, or a SSA claims representative at the district office, or an administrative law judge, or a temporary administrative law judge, under 9811 when a claimant who doesn't know very much, but who knows something and hears something, says, "How come I got a temporary judge when my next-door neighbor got a regular judge?"

Mr. Chairman, the commissioner, the director of the bureau, the man who knows best, Mr. Wilson Mathews, the substance of your committee staff's report, administrative law judges and rank and file administrative law judges all over the country have all said and say without qualification and without exception that SSI hearing examiners are qualified by experience on the job, as well as by the substance of their prior experience in private practice which got them on the SSI appointment, and which is identical, except in number of years, to title II application.

Even Mr. Dullea in response to one of your committee members last Friday, even Mr. Dullea of the administrative law judges, and I am amazed, but it is there on the record, conceded in effect that hearing examiners were qualified to hear title II disability cases.

Mr. Chairman, the suggestion has been made, and will be made again today, I understand, that SSI hearing examiners and black lung personnel be used as professional assistants to assist the administrative law judges.

The commission has just hired a number and will hire 130 more young lawyers to do that kind of work. You don't need professional assistants at grade 14. You have them at grade 11, you have them there, and they are not being utilized as well as they could be by ALJ's all over the country now.

An administrative law judge, no matter how much professional help he gets, if you go into a conscientious job of reviewing the cases and ferreting out the evidence as we have to do in this proceeding, because you don't have lawyers representing claimants most of the time, and if you are going to do a good job, you have to ferret out the evidence with sometimes ignorant and scared-to-death claimants.

I will conclude, Mr. Chairman, so we won't have to go forward when you come back.

It would be an absolute waste of everybody's time to try to make grade 11 legal assistants qualified examiners who are ready and willing and able to get to work on BHA's and this committee's immediate problem for the next 3 years backlog and how to get rid of it.

We are ready, and we submit the legislation to establish permanent ALJ's—that will solve the problem for every social security claimant in the country, and the immediate problem this committee and the Congress is concerned with will be solved, and we can go forward with the long-range problems we are talking about, including the Bureau of Hearings and Appeals.

[The prepared statement follows:]

STATEMENT OF MORRIS H. KROSS, PRESIDENT, ASSOCIATION OF SSI HEARING EXAMINERS

PURPOSE

The purpose of this statement is to suggest that legislation, to put current SSI Hearing Examiners into permanent Administrative Law Judge positions, is the logical, efficient and most reasonable method of ensuring efficient, speedy, fair and independent hearings of appeals by the Bureau of Hearings and Appeals.

THE NEED FOR MORE ADMINISTRATIVE LAW JUDGES

It would be superfluous to make any further statement here about the urgent necessity of eliminating the current BHA backlog of pending appeals, and to give applicants a speedy and timely hearing and decision on their claims.

Both the Administration and your Committee Staff Report recognize that, despite all the management procedures being taken, the backlog continues to exist now and the number of requests for hearings does not appear headed for any substantial decrease in the foreseeable future. Given all the staff support and assistance possible, it is obvious that an Administrative Law Judge, who is doing a conscientious job, can only handle a limited number of decisions. The Bureau recognized this, and determined that 150 more Administrative Law Judges should be appointed as soon as possible. In addition, during the next three years 248 of the current ALJ's will be eligible for retirement.

We submit that the facts speak for themselves. 400 new ALJ's will be needed within the next three years, and at least 150 are needed now. There is no other way to reduce the backlog and have timely hearings and decisions.

APA STATUS IS ESSENTIAL FOR ALL SOCIAL SECURITY HEARINGS

Although it has been fairly well-recognized that Title II hearings are under the Administrative Procedures Act, the issue has not been finally resolved by the courts, and there are still those who say they should not be. The history of SSI (Title XVI) hearings, and the current non-applicability of the APA in violation of the congressional intent, is documented in the reports of our Committee's staff.

There are those who say that the APA is suited for appeals before the regulatory agencies with formal and adversary hearings, but not for the type of hearings conducted by beneficiary agencies such as SSA. We are not impressed by the niceties of legal theory used to justify such a view.

It is inconceivable that, at a time when the whole image and integrity of government is in some doubt, Congress would say or permit that corporations may get due process before an independent judge, but the individual citizen may not get such fair plan, but should be relegated to some other process of unknown independence and integrity. For most individual citizens, contact with the federal, judicial system is in hearings such as these, not in the courts. Their view of government and the fairness of its judicial process will be shaped by their contact with it. The APA is the only system, extant in government today, which can ensure a hearing officer with complete independence of judgment and decision-making, to give both the appearance and substance of a fair, due process hearing. The fact that there are different, agency-type hearings, does not affect the appointment of an independent ALJ for Social Security hearings. All hearings and hearing officers should be under the APA, and legislation is needed to specifically and clearly spell this out, and settle the matter once and for all.

SSI HEARING EXAMINERS SHOULD BE MADE PERMANENT ADMINISTRATIVE LAW JUDGES NOW

The current corps of SSI hearing examiners is uniquely ready, prepared and qualified to fill the need for 150 new ALJ's *now*. There are approximately 125 on duty now. Most of them do not carry a full work load because they cannot hear Title II cases. Within 24 hours after enactment of legislation, they could be at work attacking the backlog. They are already settled into permanent locations, with existing office space, equipment and staff.

SSI Examiners have already demonstrated their capacity to fill Administrative Law Judge positions, based upon merit and competitive examination among candidates. The quality and level of experience required in the examinations for SSI Hearing Examiner is identical to that required for Administrative Law Judges. The only difference is that the SSI Hearing Examiner examination requires a slightly shorter period of recency (*time*) of qualifying experience.

SSI Hearing Examiners have demonstrated their capacity and qualifications to be Administrative Law Judges by the work they are presently doing. Substantially all SSI hearings involve disability determinations, made under provisions of law and regulations identical to Title II disability cases. Actually, SSI cases are more complex and difficult than Title II cases. They may involve additional income and resource issues. Determining extent of impairments and vocational capabilities of SSI claimants is in itself more difficult, because they generally do not have the level of history of employment experience of Title II claimants. In short, these people are absolutely qualified to be Administrative Law Judges.

The current, anomolous Grade 13 of SSI HE's is a part of the whole erroneous process of the Civil Service Commission in failing to recognize both the Congressional intent and the equal level of work required of SSI as compared to

Title II hearings, and this unfair and unreasonable circumstance would also be corrected by such legislation. The current SSI HE's are highly qualified lawyers, who gave up positions and careers to assure their new careers in permanent duty stations assented to by them. They should be protected in that choice, not subject to assignment to new duty stations. They are needed everywhere. Any gaps can be filled in by continued appointment of new ALJ's which will still be needed to fill vacancies as they occur.

Attempting to obtain enough new ALJ's *now* is apparently impossible. BHA planned to appoint a new class of 75 ALJ's in June, 1975. After going through the certificate of eligibles, provided by the CSC, only a class of 43 was obtained. In addition, every such new ALJ must be given time to clean up his private affairs and practice, go through a six week training course, and be set up in new office space with new staff, equipment, etc., acquired. He must also learn on the job and develop the proficiency to handle a full case load Thus, there is a delay of six months to a year before a brand new ALJ is fully performing. This procedure is simply wasteful, inefficient, and time-delaying, while the backlog builds and 125 qualified SSI HE's are ready to work now.

Finally, we note that various plans for "Temporary ALJ's", such as H.R. 8911, undermine the integrity and independence of the hearing process. Temporary ALJ's are subject to ongoing supervision, rating, etc., of the Secretary, and, most important, remain temporary until appointed by the Secretary from a CSC register. This is actual destruction of the whole concept of a hearing officer independent of the agency for which he works. And how do you justify, to a claimant, the fact that he got a temporary, non-APA "judge" while another got a regular "judge," and satisfy that claimant he got a fair hearing. Both in form and substance, any such plan is unwise, lacks guarantee of due process, and is unnecessary in view of all the circumstances.

RECOMMENDATIONS

We recommend that legislation be enacted, as speedily as possible, as follows:

1. Section 1631(d)(2) of the Social Security Act be amended to provide that:

A. The secretary shall hereafter appoint administrative law judges to conduct such hearings in accordance with Section 3105, Title V, U.S. Code.

B. Hearing Examiners, heretofore appointed by the Secretary under this section, shall be deemed to have been appointed as administrative law judge under Section 3105, for the duty station where they now serve, and shall hold the same grade, title, and position as administrative law judges heretofore and hereafter appointed.

2. Section 205(b) and Section 1631(c)(1) of the Social Security Act be amended to provide that such hearings shall be conducted subject to and under the Administrative Procedures Act, Title V, U.S. Code.

In summary, it would appear that the needs of both BHA and Social Security claimants will be best met by adoption of the foregoing legislation.

Mr. BURKE. Thank you.

We just got another rollcall. We will be right back and then we will hear Mr. Reed.

Mr. STEIGER. Mr. Chairman, can I ask unanimous consent to submit some questions to this panel, and have the answers in the record?

Mr. BURKE. Is there any objection?

I hear no objection.

So ordered.

Mr. STEIGER. May I also ask one other thing of our former colleague, Judge Watson. You have just heard an eloquent plea by those now serving as hearing examiners.

Can you give me any single understandable, rational, logical reason why this committee and the Congress ought not to make the hearing examiners ALJ's and end the controversy?

Mr. WATSON. I think the argument that I give will be that it is logical and reasonable, and I will add one further thing. It is certainly in line with the protection of the Administrative Procedure Act. As I stated initially, if Congress wishes at this time, or permanently, to exclude us from the act, and they can do so, they can make the exception. I well realize that. That is why I told some of my colleagues not to get too deeply involved in the legal aspects, because Congress, if they don't like the law, will change the law.

The thing is that you have decided that the law is going to be the APA proceeding, and we all agree with that, and I concur in that.

The heart of the APA proceeding, and Congress has repeatedly said that, is a totally independent APA judge, and I have said earlier that we want more ALJ's We don't want them making exclusions for us. These gentlemen and I have been urging here——

Mr. **Steiger.** Albert, be careful. On what basis are you going to say that the hearing examiner becomes an ALJ?

Mr. **Watson.** The basic thing is a matter of the qualifications.

Mr. **Steiger.** Between 4 and 7 years?

Mr. **Watson.** He referred to Mr. Wilson Mathews as a man who was totally independent in this, quoting him, I believe, and he has done a remarkable job in following this hearing examiner program in setting up the qualifications.

But I think the basic thing we have to wrestle with is, Do you believe the independent qualifying agency—to wit, the Civil Service Commission—is in order? I will state that I think it is.

I think we should make the exception and, of course, Congress has that right, but I think it is very essential.

These gentlemen presently are subject to performance ratings, and I happen to think there is no such thing when you look at independent decisions. It is like pregnancy. You can't be a little bit pregnant. You are either independent or you are not.

Mr. **Steiger.** I will tell you frankly that it fails for a logical reason to respond to the question.

As I told Judge Grossman and Judge Silbert when I saw them in my office, it is inconceivable that this committee should spend its time worrying about GS ratings.

The 3 years' difference in the practice of law just leaves me absolutely cold. So I will ask you to go back and rethink and see if you can come up with a more reasonable answer as to why we should adopt his suggestion, and I will be more than happy to listen to it.

Mr. **Watson.** All right. I will try again.

I think that we must both agree that if you conclude immediately that that is the reasonable and logical answer, then any response that I might make that does not fit into that particular conclusion would not be necessarily construed as reasonable by the gentleman who asked the question, and I am now talking in riddles, and we understand one another, and you say you have a very strong feeling on that, and you have expressed it there, and I understand that, and I respect your feeling, but the point I am trying to make here is that we understand these gentlemen want to move up.

We understand administratively speaking that——

Mr. **Steiger.** Your bill raises you from a GS-15 to a GS-16 overnight.

Mr. **Watson.** Is is one basic thing. That is the procedure whereby we are qualified to be the ALJ's under the Administrative Procedures Act.

Mr. **Steiger.** But the 7 years' experience requirement is the key, is that not the fact?

Mr. Watson. And written and oral examination, yes, sir.

Mr. Steiger. But are they not the same? Does the hearing examiner system leave out the kind of experience and background requirement that you had to meet?

Mr. Watson. No. I understand from Mr. Mathews that he stated that the experience was not as much as ours. It was 4 years' experience, I believe.

Mr. Kross. Four for GS-13.

Mr. Watson. Many of you are 14's.

Mr. Kross. By the way, Mr. Chairman, 92 of the current hearing examiners have only had 7 years of experience, including SSI experience as of September 31, 1975.

Mr. Watson. The basic question you have to decide is whether you want the Civil Service Commission to continue with its procedures. I happen to think it is a good thing. I didn't ask for an exception, and I see none, and I am sure that these other gentlemen—frankly, when he mentioned he was on the 15 or 16 register, I am sure a gentleman of your perception would say, "Why aren't you a regular ALJ now?" The gentleman who was speaking in behalf of the hearing examiners.

I don't believe if I am on the 14 and 15 register that I would be a 1, or whatever.

I don't want you to feel it is an interassociational squabble.

Mr. Steiger. It looks like it.

Mr. Burke. Would you explain to me what are the qualifications to be a member of the Supreme Court?

Mr. Watson. You have made a cogent observation, and we won't get into that.

Mr. Burke. Are there restrictions outside of being confirmed by the Senate and having known a President, and being a lawyer.

Mr. Watson. The qualifications for hearing examiners, black lung judges, and regular ALJ's may be a little more stringent than those of the court. I am not faulting anybody else. As I said earlier, we are looking for an orderly solution to this problem, but if you want to grandfather them in, I say this: I believe Mr. Fauver, who heads up the Federal administrative judge conference might address this question. Mr. Keatinge who was here earlier testified on the APA he made reference that there are a good many lawyers out in the respective districts, who, because of the economy and other reasons might like to come in and compete for appointment under the Civil Service Commission qualifications.

If Congress wishes to exclude them, they may do so, but that is a decision you will have to make.

Mr. Steiger. I apologize for getting off on that.

Mr. Burke. Are you going to submit your questions?

Mr. Steiger. I will.

Mr. Burke. We will recognize Mr. Reed now. He has been very patient.

STATEMENT OF JACK R. REED

Mr. Reed. Thank you, Mr. Chairman.

On behalf of the approximately 100 black lung administrative law judges in the SSA I wish to extend my thanks to the members of the committee and the staff for the opportunity to appear before you today and to present our views on a matter that is of serious concern not only to the administration and to every Member of the Congress and, more significantly, to the public generally.

We have filed a written statement that sets forth the views of our association. At this time, I do not propose to take up the committee's time by reading that statement to you in detail. However, I would like to discuss briefly what we feel are the most important points.

Mr. BURKE. Your entire statement will be placed in the record, without objection.

Mr. REED. Thank you, Mr. Chairman.

I concur fully with everything Mr. Kross has said, and also the statements that Mr. Wilson Matthews made this morning, and this afternoon.

This association submits that the best and most feasible solution to the problem of the hearing backlog is the prompt and efficient utilization of the more than 200 temporary administrative law judges and permanent hearing examiners now employed by the Bureau, in the SSI programs and in the black lung programs.

At this time, there are approximately 100 temporary black lung judges. All the black lung judges had to have 6 years of requisite experience to get their GS–14 appointments.

Now, everyone of the black lung judges left on the face of this earth have more than 7 years of some experience. No real question is raised as to their qualifications to hear and decide all types of cases before the Social Security Administration. For some time black lung judges have heard and decided claims under the Coal Mine Health and Safety Act, which are similar.

Black lung cases involve somewhat more complex issues than do many social security agencies, because of the technicalities of the Federal Coal Mine Safety Act.

As a practical matter, all of the 100 black lung judges 100 or so that we have now, have permanent SSA appointments, and when the black lung program concludes, we will go to work as SSI hearing examiners. Presumably this will be in about 5 months, probably the last of March next year.

The black lung judges and the SSI hearing examiners are an untapped resource of the Bureau of Hearings and Appeals. They are a uniquely qualified group with more than 200 trained and qualified individuals with proven abilities to hear issues and decide cases.

We are presently functioning within the administrative apparatus of the Bureau, and have staffs and offices and other things that are necessary to function as administrative law judges in the hearing process.

Once enabling legislation is passed, minimal additional orientation would be required to place all these individuals in a position to start hearing and deciding the cases, and bring the backlog down to a manageable level.

We urge that this Congress enact legislation necessary to enable black lung judges and SSI hearing examiners to hear all kinds of cases before the Social Security Administration, including the remaining black lung cases.

Mr. Chairman, I have concluded my remarks. I would be happy to answer any questions that might be raised.

[The prepared statement follows:]

STATEMENT OF JACK R. REED, CHAIRMAN, BLACK LUNG ADMINISTRATIVE LAW JUDGES' ASSOCIATION, OFFICE OF THE BUREAU OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, KNOXVILLE, TENN.

SUMMARY

Utilization of the more than 200 highly qualified Black Lung Judges and SSI Hearing Examiners of the Bureau of Hearings and Appeals to hear Social Security cases is the best and most logical way to resolve the Bureau's backlog of 113,000 cases. A pending bill, HR 8911, would allow such cases to be heard by temporary Hearing Examiners under appointments expiring December 31, 1978. This Association supports HR 8911 but submits that permanent appointments, limited to the Bureau's incumbent Black Lung ALJs and SSI Hearing Examiners, would be preferable to creation of the proposed corps of temporary Hearing Examiners. Although this method of tendering permanent appointments to BHA Hearing Officers differs from the usual way that Administrative Law Judges are recruited and selected by the Civil Service Commission, it is warranted by the unique qualifications of incumbent Black Lung Judges and SSI Hearing Examiners who are experienced in the Social Security Appeals Process.

STATEMENT

Commissioner Cardwell testified before the Sub-Committee on Public Assistance on June 3, 1975 that the Bureau of Hearings and Appeals of the Social Security Administration was faced with a backlog of 113,000 hearing requests. The backlog includes Black Lung, SSI and Medicare cases. However, the vast majority of cases in the backlog are disability claims under Title II of the Social Security Act. The hearings backlog is not only detrimental to efficient operations of the Social Security Administration, but it is also a matter of serious concern to all members of the Congress, regardless of political affiliation.

This Association submits that the best and most feasible solution to the problem of the hearing backlog is the prompt and effective utilization of the more than 200 temporary Administrative Law Judges and permanent Hearing Examiners now in the employ of the Bureau of Hearings and Appeals in the Black Lung and SSI Programs, to hear and decide SSI, Social Security and remaining Black Lung cases.

There are approximately 100 temporary GS–14 Administrative Law Judges serving in the BHA Black Lung Program. No real question exists as to their qualifications to hear and decide all types of cases before the Social Security Administration. For some time, Black Lung Judges have heard and decided disability claims under the Federal Coal Mine Health and Safety Act that are substantially similar in their substantive content and procedural aspects to disability claims under Title II of the Social Security Act. If anything, Black Lung cases involve more complex legal issues than do regular Social Security cases.

The Secretary tendered appointments as Administrative Law Judges to the incumbent Black Lung Judges only after they first satisfied stringent experience requirements and selection procedures essentially similar to the experience requirements and selection procedures of the Civil Service Commission for Administrative Law Judges. The more than 100 SSI Hearing Examiners are also well qualified to hear and decide Social Security cases, although those GS–13 appointees were not required to have as many years of the requisite qualifying legal experience in order to receive their appointments as were the GS–14 Black Lung Judges.

The Black Lung Judges and SSI Hearing Examiners are an untapped resource of the Bureau of Hearings and Appeals. They are a uniquely qualified pool of 200 trained and highly qualified individuals with proven abilities to conduct hearings and decide cases. They are presently functioning within the administrative structure of the Bureau, equipped with offices, secretaries, hearing assistants, books, equipment and the other resources necessary to function as a judge in the Hearings Process. Only minimal additional training and administrative detail would be required by the Administration to place those individuals in a working situation to handle cases in the Social Security Appeals Process. Enactment of the legislation necessary to enable Black Lung Judges and SSI HEs to hear and decide such cases is the first logical step towards a prompt and effective resolution of the backlog and the general problems of delay in the Social Security Appeals Process with which these hearings are concerned. Accordingly, this Association urges the enactment of appropriate legislation to enable Black Lung ALJs and SSI Hearing Examiners now in the employ of the Bureau of Hearings and Appeals of the Social Security Administration to hear and decide all classes of cases before the Social Security Administration, including the remaining Black Lung cases under Title IV of the Federal Coal Mine Health and Safety Act and Social Security and SSI claims under Titles II, XVI and XVIII of the Social Security Act.

HR 8911, a bill now pending in the House of Representatives, is the work product of this committee. Section 3(c) of that bill would authorize the Secretary of HEW to appoint Hearing Examiners to conduct hearings in cases under Titles II, XVI and XVIII of the Social Security Act under temporary appointments that would expire not later than December 31, 1978. HR 8911, if enacted in its present form, would provide an opportunity for Black Lung Judges and SSI HEs to hear Social Security cases.

This Association recommends, however, that Section 3(c) of HR 8911 be changed to give the temporary Hearing Examiners specific statutory jurisdiction to hear Black Lung cases under Title IV of the Federal Coal Mine Health and Safety Act. Although the Black Lung Program will be essentially concluded within the next few months, it is likely that a number of Black Lung cases will be before the Bureau during the next several years because of court remands and possible legislative changes. Presumably, if HR 8911 is enacted, the Bureau's existing corps of Black Lung Judges, for the most part, will be merged into the proposed corps of temporary Hearing Examiners contemplated under Section 3(c) of HR 8911.

Further, this Association urges the committee to consider the feasibility of amending Section 3(c) of HR 8911 to allow appointment of the Hearing Examiners on a permanent basis and to limit those appointments to Black Lung ALJs and SSI Hearing Examiners in the employ of the Bureau when the Act becomes effective. It could be said that temporary judges would lack independence because they would not have job security and would be more apt to be subject to Agency control. Although the Black Lung Judges who have served under temporary appointments have not, as a practical matter, been subject to interference by Bureau personnel in deciding their cases, that objection could always be raised by claimants and by other individuals critical of the Hearings Process. Permanent appointments would avoid that problem from ever arising.

Black Lung Judges are not strangers to a temporary situation, some receiving their original temporary appointments in April, 1972. They went into a crash program and successfully reduced the staggering backlog of Black Lung cases to a now manageable level and by the end of 1975 will have heard and decided all existing Black Lung cases. Black Lung Judges made substantial sacrifices to become Administrative Law Judges on a temporary basis, giving up law practices and legal positions in government and private industry to join the Bureau of Hearings and Appeals. SSI Hearing Examiners made similar sacrifices. Black Lung Judges and SSI Hearing Examiners are in the position of having "burned their bridges." Many sold their homes and moved to new areas to serve with pride in their new positions. This Association submits that a recognition of those sacrifices and services, through legislation authorizing permanent appointments with jurisdiction to hear and decide Social Security cases, is clearly warranted at this time.

The Administration has indicated that the temporary appointments will be limited to Black Lung Judges and SSI Hearing Examiners now employed by the Bureau. We have no reason to doubt the good intentions of the Administration, but it would seem to be in the public interest to limit the appointments by statute to Black Lung Judges and SSI HEs who are experienced in the Hearings Process. Certainly, the more than 200 Judges and Hearing Examiners involved, with their existing support staffs, should be a number sufficient to effectively reduce the BHA case backlog to a manageable level within a reasonable period of time.

Various groups have said that even a minor deviation from the usual Civil Service Commission appointment process for Administrative Law Judges would be the beginning of a progressive deterioration of that process. This is not the case Only those Judges and Hearing Examiners presently performing satisfactorily in the same judicial functions would be appointed. Appointments would then revert to the usual procedure under the APA.

BHA management recently noted that it would make little sense to require Civil Service Commission screening of individuals who are already working in DHEW, when appointment authority has always been vested in the Agency and not CSC.

In conclusion, we reiterate that the solution to the problems of delay in the Social Security Appeals Process, manifested by the backlog of 113,000 Social Security cases in the Bureau of Hearings and Appeals, lies in effective utilization of the Bureau's Black Lung Judges and SSI Hearing Examiners to hear such cases. Those Judges and Hearing Examiners, more than 200 in number, constitute a uniquely qualified group of individuals with proven abilities to hear and decide cases. Enabling legislation to permit them to hear Social Security cases is the logical way to reduce the hearings backlog.

Mr. BURKE. We will hear Mr. Fauver now.

STATEMENT OF WILLIAM FAUVER

Mr. FAUVER. Mr. Chairman, with the Chair's permission, I would like the record to show a correction on page 7 of my statement. I would like to insert "Section 3" before H.R. 9811, with the Chair's permission.

Mr. BURKE. Yes, without objection, so ordered.

Mr. FAUVER. I assume my statement will be in the record at this point.

Mr. BURKE. Without objection, all the statements will appear in the record.

Mr. FAUVER. I appreciate the opportunity to appear before you to discuss the hearings and appeals processes in the Bureau of Hearings and Appeals of the Social Security Administration.

The Federal Administrative Law Judges Conference is an association whose membership includes a large majority of the approximately 800 administrative law judges who have been appointed pursuant to the Administrative Procedure Act to serve in 27 executive departments and independent regulatory agencies.

One of the fundamental interests of our Conference is to promote the efficiency and fairness of the procedures provided for under the Administrative Procedure Act. We are therefore especially concerned with those aspects of this committee's deliberations that deal with possible revisions in the hearings and appeals provision under the Social Security Administration's programs.

The Conference recognizes that this committee faces novel and extraordinarily difficult questions of both substance and administration in its review of these programs, and that a sense of crisis in these programs may justify strong, innovative measures to resolve these questions satisfactorily. More specifically, problems continue to exist in the process of providing prompt service to claimants under these programs, and it very well may be that dramatic changes are warranted in existing procedures. However, we strongly urge that, in facing these problems and devising appropriate means of dealing with them, this committee will specifically weigh both (1) the implications that any proposed changes may have for the larger structure of administrative law in our country today, and (2) the real consequences of these changes as they affect the rights and interests of individual claimants.

Mr. STEIGER. That is one point on which all of you agree.

Mr. FAUVER. If I may proceed with the statement.

Mr. BURKE. Mr. Steiger?

Mr. STEIGER. I am simply making a comment. That is a point on which you all agree.

Please go ahead.

Mr. BURKE. You may proceed.

Mr. FAUVER. I will be brief, but there is some continuity to the statement when I wrote it.

Mr. Chairman and Mr. Steiger, we appreciate the opportunity to present our remarks to you. The Federal Administrative Law Judges Conference appreciates the setting of these special hearings, and we will attempt to assist the work of the committee in any way possible.

[The prepared statement follows:]

STATEMENT OF WILLIAM FAUVER,* PRESIDENT, THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you to discuss the hearings and appeals processes in the Bureau of Hearings and Appeals of the Social Security Administration.

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The Conference recognizes that this Committee faces novel and extraordinarily difficult questions of both substance and administration in its review of these programs, and that a sense of crisis in these programs may justify strong, innovative measures to resolve these questions satisfactorily. More specifically, problems continue to exist in the process of providing prompt service to claimants under these programs, and it very well may be that dramatic changes are warranted in existing procedures. However, we strongly urge that, in facing these problems and devising appropriate means of dealing with them, this Committee will specifically weigh both (1) the implications that any proposed changes may have for the larger structure of administrative law in our country today, and (2) the real consequences of these changes as they effect the rights and interests of individual claimants.

One pending proposal for change intended to facilitate the hearings of SSA and SSI appeals, for example, would have most serious adverse implications in the evolution of administrative law in this country. That proposed change appears as Section 3 of H.R. 8911, the "Supplemental Security Income Amendments of 1975." In effect, Section 3 would create a new and lower category of hearings under the Administrative Procedure Act exclusively for claimants under the Social Security Act programs. In immediately practical terms, such legislation would be unjustly discriminatory toward those claimants. It is for these reasons that the Conference opposes enactment of the kind of change that Section 3 represents.

H.R. 8911 itself deals with a complex array of substantive issues. In its essence and concept, Section 3 is entirely severable from the other provisions of H.R. 8911.

The statement of purpose and rationale of H.R. 8911, attached to the July 25, 1975 Report of the Subcommittee on Public Assistance, includes the following comment regarding Section 3:

"Section 3 of the bill eliminates the distinction between the nature of hearings and hearing officers under the Social Security and SSI programs, thus resulting in a common corps of hearing officers authorized to conduct hearings under both programs and equal procedural safeguards provided under the Social Security Act and Administrative Procedure Act for claimants under both programs. This purpose is achieved by repealing the existing authority for the appointment of SSI hearing examiners in title XVI the same requirements for hearings as apply to hearings under title II of the Act, including the substantial evidence rule in judicial review cases. The Secretary would be given temporary authority (expiring December 31, 1978) to appoint hearing officers to conduct hearings under titles II, XVI and XVIII without meeting the requirements for appointment under Section 3105 of Title V, United States Code."

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*Administrative Law Judge, United States Department of the Interior.

For the purposes of the present discussion it should be recognized that Section 3 of H.R. 8911 does these several things:

1. It provides a claimant who disagrees with the government's determination of his claim a right to reasonable notice and opportunity for hearing;
2. It provides in effect that the hearing shall be in accordance with the Administrative Procedure Act; and
3. It provides that the government may waive that Administrative Procedure Act in its selection of persons to conduct the hearings.

The mechanism proposed for achieving this waiver is authority given the Secretary of Health, Education, and Welfare to establish a group of "hearing examiners" to conduct Administrative Procedure Act hearings without meeting the statutory qualifications and appointment requirements thereof. Specifically, Section 3 empowers the Secretary, whenever he "finds it will promote the achievement of the objectives" of the Act, to recruit, select and appoint hearing examiners to conduct all types of hearings arising under titles II, XVI, and XVIII of the Social Security Act, "notwithstanding the provisions of Section 3105 of title V, United States Code."

Such a mechanism is fundamentally inconsistent with the concepts underlying the Administrative Procedure Act, as it has evolved over the past three decades. The hallmark of an APA hearing in which the rights of a person (or even those of a corporation) are being adjudicated is the right to be heard, face-to-face, before a person appointed under the provisions of Section 3105 of title 5. These appointment provisions are an assurance of impartiality in the person conducting the APA hearing:

Such person has no fear of offending agency officials in deciding cases, since he is not subject to the agency for promotion, demotion, performance ratings, or changes in pay.

Such a person is assigned to cases in rotation insofar as practicable, and may not be assigned duties inconsistent with the hearing function.

Such a person may be removed only for good cause established and determined by the Civil Service Commission.

The APA's safeguards for judicial qualifications, impartiality, and independence of presiding officers are the foundation of the statute's design to provide fairness and professionalism in administrative law. The relevance and importance of these guarantees in disability cases are succinctly set forth in Professor Rosenblum's recent draft report to the Administrative Conference of the United States (quoted here with permission of the author):

"* * * Reducing presiding officers' levels of independence, impartiality, and expertise will hardly contribute to resolution of problems of delay, overly zealous judicial review, or actuarial insufficiencies in the disability fund. On the contrary, denigration of the professionalism and impartiality of presiding officers in disability cases can only exacerbate such problems. * * * [pp. 95–96.]

"* * * Administrative agencies must (a) formulate and articulate their policies with candor and clarity to facilitate prompt and competent ALJ decisions, and (b) avoid seeking or accepting special Congressional authority to appoint hearing officers outside the APA when the agency expects or intends otherwise to be bound by APA hearing procedures. [p. 127.]

"All Americans are entitled to fair and impartial treatment by their governmental agencies, and fairness fosters both the doing and acceptance of justice. Put simply, there is greater assurance of fairness of a hearing officer who is insulated from agency pressures and governed directly by Civil Service Commission personnel standards than who is beholden for evaluation and tenure to the agency over whose cases he or she presides. * * * [p. 147.]

"* * * [D]emonstration of the unique strength of the administrative process as an instrument of justice for all Americans can best be made—not by Balkanizing it through widespread exemptions of hearing officials from APA coverage—but by utilizing the APA fully, creatively and consistently. * * *" [p. 150.][1]

Both conceptually and practically, a hearing conducted by an employee not qualified and appointed in accordance with Section 3105 is not an APA hearing. It may well be that such a hearing would satisfy the minimum requirements of due process within the meaning of *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), but the actual promise to claimants in H.R. 8911 is of an APA hearing.

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[1] Victor G. Rosenblum, "The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles" (Second Draft, September 1975).

It must be recognized that, contrary to its surface promises, Section 3 of H.R. 8911 actually would create a new, and lower, category of hearings for claimants under the government's Social Security programs. It does not seem a fair way of determining the rights of these claimants, when on the surface of this legislation they are being promised more than that.

Large and powerful corporations, and associations of such corporations, are fully familiar with the workings and guarantees of the APA, and they will always be alert to any encroachments on the protections existing administrative law gives them. But private citizens in dealing with the government tend not to be so well organized or alert to the complexities and entitlements of administrative law. They are the ones upon whom the burdens of short-cut justice are likely to fall.

Nor does it seem a wise or timely departure now in the history of American administrative law to create power in an executive department to waive heretofore essential elements of a fair APA hearing. The Administrative Procedure Act services as a real "Bill of Rights" in an inexorably expanding complex of governmental participation in the daily personal, social, and economic activities of our nation's citizens. This is not the time to weaken that "Bill of Rights." Section 3 of H.R. 8911, if enacted, will serve as a precedent for other agencies of government, in times of apparent "crisis," in a search for quick answers to difficult problems, to strip away the hard-won protections of American administrative justice.

Proponents of Section of H.R. 8911 may seek to rely upon SSA's appropriations in 1959 and 1960 as precedents for the employment of "temporary" hearing examiners. However, the record does not show that such were desirable precedents. As summarized in the Staff Report of this Subcommittee (dated September 17, 1975):

"The American Bar Association's Administrative Law Section at that time opposed in principle the use of temporary examiners, although they acknowledged the problem of the work load crisis. This also was the stance of the Harrison subcommittee of Ways and Means which in its 1960 report was concerned with the fact that the "temporary examiners came almost exclusively from the administering agency["] * * * "[*Background Material on Social Security Hearings and Appeals*, Prepared by the Staff of the Subcommittee on Social Security, House Ways and Means Committee, pp. 4–5.

As the Harrison Subcommittee concluded on this subject, it was "gratified to learn" that "such authority will not be requested from the Appropriations Committee in the future."

We would urge the Committee to press hard for a different approach to the problems of handling claims appeals in these programs. Several studies, including those of administrative law judges active in the adjudication of disability claims, give persuasive evidence that much more efficient and practical solutions are at hand.

The evidence is persuasive that the real stoppage in the present system occurs in what is known as "case development," the early stage in which a claimant's case is being "fleshed out" and documented, and that the use of administrative law judges to investigate rather than adjudicate the cases is both inefficient in time and wasteful in manpower.

We urge the Committee to give careful consideration to the provisions of H.R. 8018 and H.R. 8994, which were introduced on June 18 and July 29, respectively. The processes spelled out in these bills appear to offer a direct and efficient means of handling appeals within the various programs of the Social Security Act. Under these bills, an effective means would be available for helping the claimant to document and fully develop his case at an early stage. This informal "case development" would include at the reconsideration level a full investigation of the relevant facts and opportunity for a face-to-face conference between the claimant an individual participating in the decision. In addition, the government would be required to furnish the claimant a clear statement of the relevant facts and the reasons for its decision.

This type of approach seems vastly more rational and promising than present procedures, whose weaknesses and defects section 3 of H.R. 8911 would set more deeply into concrete.

The kind of APA hearing contemplated by H.R. 8018, one which would largely be an appellate consideration of the case record thus far developed, but one in which the administrative law judge would provide a hearing on material fact issues, seems to be well suited to the kind of decisionmaking required under the pertinent social security programs.

Cases decided in the kind of processes proposed in H.R. 8018—an efficient process, but one attentive to the needs of the claimants for completeness and a fair hearing—would seem likely to receive broad acceptance in the Federal courts. In turn, such processes would mean speedier justice and lesser case volume in the courts.

Mr. Chairman, we appreciate the opportunity to present these remarks to you. The Federal Administrative Law Judges Conference applauds the diligence and concern of this committee in setting these special hearings. We shall endeavor to assist the work of the committee in any way that we can.

Mr. BURKE. Thank you.

Mr. Steiger?

Mr. STEIGER. I will submit my questions, Mr. Chairman.

Mr. BURKE. Mr. Steiger will submit his questions, and we will appreciate your responding so that we can put them in the record. We will hold the record open.

[The questions and answers follow:]

THE BLACK LUNG ADMINISTRATIVE LAW JUDGES' ASSOCIATION,
OFFICE OF THE BUREAU OF HEARINGS AND APPEALS,
SOCIAL SECURITY ADMINISTRATION,
Knoxville, Tenn., October 10, 1975.

Hon. WILLIAM A. STEIGER,
Member of Congress, Committee on Ways and Means, U.S. House of Representatives, Washington, D.C.

DEAR MR. STEIGER: This is in reply to your letter of September 30, 1975.

Page 2 of our statement reads in part:

"The secretary tendered appointments as Administrative Law Judges to the incumbent Black Lung Judges only after they first satisfied stringent experience requirements and selection procedures *essentially similar to* the experience requirements and selection procedures of the Civil Service Commission for Administrative Law Judges."

Your letter contains the following questions:

"If the Civil Service Commission set the appointment qualifications and established the position as that of an ALJ (temporary), why didn't they supply the registers?" and

"If Black Lung Hearings are under the APA, as you stated, why is it not possible for Black Lung ALJs to conduct hearings under Title II of the Social Security Act?"

We do not know the extent to which Civil Service set the appointment qualifications and established the position of temporary ALJ. Black Lung Judges were recruited pursuant to special enabling statutes, i.e., PL. 93–192 and similar legislation. PL. 93–192, Title II, Special Benefits for Disabled Coal Miners, third paragraph, states:

"Whenever the Commissioner of Social Security finds it will promote the achievement of the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, qualified persons may be appointed to conduct hearings thereunder without meeting the requirements for Administrative Law Judges appointed under 5 U.S.C. 3105, but such appointments shall terminate not later than December 31, 1974: provided that no person shall hold a hearing in any case with which he has been concerned previously in the administration of such title."

Subsequent legislation authorized extension of the termination dates of the appointments to December 31, 1975 and, we understand, to December 31, 1976. To date, the appointments of Black Lung ALJs have not been extended beyond December 31, 1975 but we have been told that the Administration plans to do so within the near future.

Appointments of Black Lung ALJs, tendered at various times since May 1972, were made from registers compiled by BHA under a special Black Lung Announcement for the position of GS–14 Temporary Hearing Examiner, and later from SSI registers. I would assume that Civil Service did not supply the registers because BHA elected to operate its own Black Lung recruiting program pursuant to the statutory authority of the Commissioner of Social Security to make the appointments without meeting the specific requirements of 5 U.S.C. 3105, i.e., without going through the Civil Service Commission. This arrangement probably came about through mutual agreement between BHA and Civil Service due to the exigencies of the Black Lung Program and its temporary nature.

Except for the manner of appointment of the ALJ conducting the hearing, Black Lung hearings are subject to the APA to exactly the same extent as hearings under Title II of the Social Security Act. This is because Section 413(b) of the Federal Coal Mine Health and Safety Act incorporates the same procedural provisions of the Social Security Act (mainly Sub-Sections 205 (b) and (g) of the Social Security Act) which supposedly render Social Security cases subject to the APA. Although it is debatable as to whether or not hearings in Social Security cases must be conducted by ALJs appointed from Civil Service registers under the APA, pursuant to 5 U.S.C. 3105, past practice for many years, by both BHA and Civil Service, has been to select Social Security ALJs in that manner. However, in the case of *Richardson v. Perales*, (1971) 402 U.S. 410, the Supreme Court specifically avoided taking a position as to whether or not Social Security disability cases are governed by APA, even though the 5th Circuit Court of Appeals had previously held in the same case that the APA did not apply to Social Security matters.

I believe that the specific reason Black Lung ALJs cannot now conduct hearings under Title II of the Social Security Act is that the terms of the statute authorizing their appointment also limits their jurisdiction to Black Lung cases under the Federal Coal Mine Health and Safety Act. Certainly there is no real reason why Black Lung ALJs should not be considered qualified to hear regular Social Security cases. I reaffirm what was said in our statement and at the hearing before the Sub-Committee of September 26, 1975. Black Lung Judges are eminently qualified to hear Social Security cases, and we need only legislation expanding our jurisdiction to be able to do so.

I trust this letter adequately answers your questions. Please let me know if there is anything else we can do to assist you in this matter.

Sincerely yours,

JACK R. REED,
Acting Chairman.

THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE,
Washington, D.C., October 14, 1975

Hon. WILLIAM A. STEIGER,
Longworth House Office Building,
House of Representatives,
Washington, D.C.

DEAR MR. STEIGER: Thank you for your letter of September 30, 1975. I appreciate the opportunity to discuss with you the need for improvements in the processes for adjudicating disability cases under the Social Security Act.

I. TRANSFER OF ALJS

Your letter states that the Subcommittee has been advised that administrative law judges "move from one departmental area to another," and questions whether any regulatory agency judges have been transferred to handle Social Security cases, whether any Title II (Social Security) judges have been moved to other areas, and, in the event the latter has occurred, how this can be justified in light of the heavy backlog of Social Security cases.

Authority for the temporary loan of administrative law judges to hear cases in another agency lies exclusively with the Civil Service Commission and is granted only upon consent of the lending agency.

During the period from January 1971 to November 26, 1973, 111 Title II judges were temporarily loaned to other units in HEW or to other agencies to hear and decide 121 cases. The classification of these cases was at the GS-15 or GS-16 level, and some were unclassified (Report of Committee on the Study of the Utilization of Administrative Law Judges, Civil Service Commission, July 30, 1974, pp. 60-61). During the same period, 47 administrative law judges in Social Security were recruited for permanent transfer to other agencies, 44 involving a promotion to GS-16. Since November 26, 1973, 20 Title II judges have permanently transferred (most to GS-16 agencies) and 50 Title II judges have been temporarily loaned to other units in HEW or to other agencies. We understand that a substantial number of Title II judges are presently considering permanent transfer to GS-16 agencies.

I am not aware of any temporary loan of regulatory agency judges to hear Social Security cases, and I believe Social Security has never requested such assistance. However, in years past regulatory agency judges have been loaned to HEW (for Title VI, Civil Rights Act cases) and to CSC (for Voting Rights Act cases) to handle emergency caseload problems. See, e.g., Macy, "The APA and the Hearing Examiner: Products of a Viable Political Society," 27 Fed. B.J. 351, 389–390 (1967); and Scalia, "The Hearing Examiner Loan Program," 1971 Duke L.J. 319 (1971).

With respect to justification of temporary loans of Title II judges, I am not aware of Social Security's rationale in acceding to such loans. However, I would infer from the fact of such loans that Social Security did not view its appeals backlog as a "crisis."

With respect to the problem of permanent transfers of Title II judges to other agencies, the CSC Utilization Study concluded that the ALJs in Social Security "encounter morale problems because they do not have equality of grade with judges in most other agencies" (CSC Study, *id.*, p. 60). It would appear to me that the solution to this problem is legislation to raise Title II judges to GS–16. I would think that achieving pay equity would also alleviate the problem Social Security has identified in recruiting judges for certain cities.

II. SECTION 3 OF H.R. 8911

Your letter states that under Section 3 of H.R. 8911, "only the requirements for appointments are changed . . ., but apart from that, all provisions of the APA apply." I suggest this is not the correct interpretation, for the reasons outlined below.

The APA's safeguards for judicial independence and impartiality apply to those administrative law judges who are "appointed under section 3105" of Title 5, U.S.C. Thus, with respect to pay, Section 5362 provides that hearing examiners (administrative law judges) "appointed under section 3105 are entitled to pay prescribed by the Civil Service Commission independently of agency recommendations". Section 4301(2)(E) of Title 5 exempts from agency performance ratings those ALJs "appointed under section 3105". Protection against removal except for good cause determined by the CSC after an APA hearing is likewise provided for ALJs "appointed under section 3105" (5 U.S.C. 7521). Since Section 3 of H.R. 8911 would permit the Secretary to "recruit, select, and appoint" hearing examiners "notwithstanding the provisions of Section 3105," it would appear that H.R. 8911 contemplates agency control over the examiners.

That agency control of such examiners is actually intended is further indicated by the following considerations:

(1) The second proviso of Section 3 would exempt the new hearing examiners from the Whitten Amendment. Since the Whitten Amendment bars promotion unless the employee has served at least one year in the next lower grade, it is clear that elimination of this restriction would give the agency broad discretion to raise the pay of individuals whom it appoints to adjudicate Social Security cases. This is entirely foreign to the APA guarantees that pay shall be independently determined by the CSC and that administrative law judges shall be exempt from agency performance ratings.

(2) The appointments under Section 3 would be temporary, not to extend beyond December 31, 1978. Such appointees would know that their job security would be entirely in the hands of the Secretary. As Mr. Keatinge testified before the Subcommittee on September 26, 1975, "a person whose present and future financial job security is in the hands of the people or agency he is judging can never be sure he is making an independent judgment." (Testimony of Richard H. Keatinge, p. 8.)

I must also disagree with the assumption in your letter that the only change in the appointment criteria (APA vs. H.R. 8911) is "from Civil Service Commission's 7 years to the bill's 5 years." The thorough examination administered by the Civil Service Commission under Section 3105 is not a longevity test. It is a comprehensive examination to determine judicial qualifications, character, and maturity for appointment to a judgeship—far more than simply requiring seven years practice of law. H.R. 8911, on the other hand, does not even require the practice of law, but merely requires *admission to practice* for persons having disability claims experience.

The two systems for appointment are in no way comparable. One, the CSC system, is an independently-administered examination based upon well-defined qualifications standards and requiring competitive examination and merit selection. The other, under H.R. 8911, would give broad discretion to the employing agency to choose its own adjudicators without competitive examination, merit selection, or recognized standards for judicial qualifications.

These deficiencies would not be corrected even if Section 3 of H.R. 8911 were amended to limit appointments to incumbent SSI hearing examiners and Black Lung temporary ALJs.

Inquiries of CSC will reveal major differences between the examination for an APA judgeship and the examination used by Social Security to select its SSI hearing examiners. For example, there are such differences as accepting a far lower level of responsibility and difficulty of legal cases for the SSI position, and accepting, for that position, broad and vague categories of experience that are not recognized as qualifying experience for the position of federal administrative law judge. Inquiries of CSC will also show that the Black Lung temporary ALJs were not selected by examination, let alone a selection process comparable to the thorough, competitive examination required for APA judges.

Nor would "grandfathering" of these employees as APA judges be a just or desirable solution. Such action would make a mockery of the competitive examination already administered to private and government attorneys who have qualified for the APA register of eligible candidates for an APA judgeship. It would frustrate the efforts of the CSC to recruit qualified candidates to compete for appointment to the APA register in the future. Finally, it would set the clock back to the days when the Congress, the ABA, and the public alike voiced strong objection to the practice of agency control and inbreeding of personnel for appointment to adjudicatory positions. There is simply no sound reason why SSI and Black Lung examiners should not be required to compete equally with other attorneys—both within and outside the Federal Government—for a judicial position that has been long established and protected under the Administrative Procedure Act. Anything less than this would lessen the quality and integrity of the administrative law system in our country, to the detriment of the public interest and that of the litigants who seek independent justice under the Social Security Act.

We therefore strongly urge that Section 3 of H.R. 8911 be rejected, either in its present form or in a revised version that would "grandfather" personnel into an APA judgeship without requiring the competitive examination administered by the Civil Service Commission.

With reference to the Harrison Subcommittee's admonition against Social Security's use of "temporary examiners," you ask whether the 1959 experience is really on "on all fours" with H.R. 8911, since the temporary examiners under H.R. 8911 are expected to be composed, "to a large degree," of SSI and Black Lung examiners who "presumably will be independent of the 'administering agency.'"

I find little distinction between the two cases. Bureau of Disability Insurance claims examiners (the principal group referred to in the Harrison Subcommittee report) in 1959 and 1960 were subject to the same type of management controls (performance ratings, in-grade increases, promotion, and discipline) as have been the SSI and Black Lung examiners since their employment by Social Security. The agency orientation and control implicit in such employment relationship indicate, to me, that the Harrison Subcommittee's concern for agency influence has direct application to the present situation. Also, as stated earlier, the prospective independence presumed in your letter is not, in my view, provided for in H.R. 8911.

Finally, H.R. 8911 authorizes the appointment of Social Security examiners from any source, including the Bureau of Disability Insurance. Indeed, the criteria contained in the first proviso of Section 3 would appear to be tailored to qualify a very large number of the 200 BDI examiners whose jobs were drastically reduced when BDI switched to sample review:

"*Provided*, That any person so appointed have been admitted to practice before a State or Federal court of record and have had at least five years' experience in the adjudication or *consideration* [emphasis supplied] of claims for retirement, survivors', disability, health insurance, or supplemental security income benefits. . . ."

III. H.R. 8018

With respect to your question as to the pay provision in H.R. 8018, FALJC favors the pay change to raise Title II judges to GS-16. As reflected by the enclosed Resolution, our organization supports an equal pay grade and classification for all administrative law judges appointed under Section 3105 of Title 5, U.S.C. The need is especially urgent at Social Security because of the serious adverse impact on the program due to the loss of Title II judges who transfer for a higher grade in other agencies.

The experience of our judges in the Bureau of Hearings and Appeals points to problems of undeveloped files, lack of remand authority, inadequate staff support, lack of authority to enter oral decisions, and failure of the overall system to achieve clearer standards, face to face communication with the claimant and other necessary improvements at the prehearing stages. As an illustration of proposals supported by numerous individual judges who are well-versed in this field, I commend to your consideration Judge Howard I. Grossman's Statement to the Subcommittee, dated October 10, 1975.

The evidence is persuasive that the appeals backlog can be readily handled by fundamental improvements that do not require an increase in the number of administrative law judges.

We applaud your efforts and those of the Subcommittee in seeking effective solutions to the problems of delay in the processing and adjudication of Social Security disability cases. This vital area affecting the individual American citizen is one of deep concern to all of us.

Sincerely,

WILLIAM FAUVER, *President.*

Enclosure.

RESOLVED THAT

The Federal Administrative Law Judges Conference recommends the establishment of a uniform salary for federal administrative law judges appropriate to their judicial responsibilities and functions and separate from the grade classification and pay schedule for other career civil servants.

REPORT

Federal administrative law judges are presently compensated pursuant to Civil Service standards and are rated in the General Schedule of pay grades. Some are in the supergrade category and some are not.

The administrative law judges have long felt that their inclusion within the established Civil Service regimen of salary structuring is unsatisfactory, that the compensation therein provided is both inadequate and inequitable as related to their judicial positions, and that correction of these defects would greatly enhance the recruitment of highly qualified candidates for these positions, especially from the private bar and the judiciary. In addition, the separate pay classifications of the administrative law judges create needless competition and turnover among judges who are drawn to higher-paying judgeships in other agencies. Inter-agency transfers based solely, or primarily, upon pay considerations obviously work an adverse impact on the continuity of agency programs.

On July 17, 1974, the President sent to Congress a message on restructuring of the supergrade salaries. The President's proposal would eliminate the supergrades (GS 16, 17 and 18) and provide a salary scale for assignment to a new category of career positions.

The pendency of the President's proposal offers a timely vehicle for renewed consideration of the serious problems concerning the pay and classification of administrative law judges.

Federal administrative law judges are, in effect, the United States District Court judges for the administrative agencies. In different jurisdictions, the cases of the District Court judges may vary in degree of complexity but the judges are competent to move from one jurisdiction to another without loss of judicial effectivness. It is the goal of our Conference to bring uniform quality of justice to the people of the United States in the cases handled by administrative agencies. With the concept of a unified corps of judges, paid a single salary, and coupled with substantive training programs, this goal is obtainable.

Congress and the Civil Service Commission should establish a separate salary classification for administrative law judges, without in-grade step differentials, and set at 90 percent of the pay level of United States District Court Judges or a salary substantially equivalent to that level.

Adopted November 25, 1974.

BUREAU OF HEARINGS AND APPEALS,
Columbia, S.C., October 13, 1975.

Hon. WILLIAM A. STEIGER, M.C.,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN STEIGER: Your letter of September 30, 1975, submitting several questions concerning the problems discussed at our appearance before your Ways & Means Social Security Subcommittee hearing on September 26, 1975, was received upon my return from a hearing trip of one week on October 13, 1975. Please know that my response to your inquiries reflect my own personal opinion, as I have not discussed these particular matters with the Board of Governors of the regular ALJ Association we are privileged to serve as President.

Your first question is whether "there is sufficient review of ALJ decisions by the Bureau of Hearings & Appeals to provide some degree of program uniformity?" I believe there is. The recent initiative of the BHA Director in eliminating "on motion" Appeals Council review of ALJ allowances for those judges with over one year experience has expedited effectuation of payments to claimants and is consonant with the requirements of the APA while reducing backlogs. It should be remembered that the ALJ is the first person charged with the decisional process who has a thorough vis-a-vis hearing with the claimant and to have his decision reversed without sufficient legal justification would be subject to manifold problems.

You further requested my comments on the fact that many of the analysts who formerly "conducted these reviews in the past are being sent out to the regions to assist the ALJs in adjudicating cases." I wholeheartedly support that initiative of the present Director of the BHA. As I stated in my testimony before your Subcommittee, it is not my purpose to fault anyone or any agency for the backlog is a problem for all of us; however, the earlier assignments of Analysts in such large numbers to the Central Office for use of the Appeals Council did not inure to the best interests of the claimant. Many field offices report that the use of Analysts, Professional Assistants and Law Clerks has increased case dispositions by as much as 50%!

Finally, you ask whether Director Trachtenberg's "aim to have Social Security ALJs do 26 cases per month is a realistic standard and can be accomplished without sacrificing quality of adjudication?" Personally I believe justice and the exigencies of the various cases preclude quotas. Nevertheless, every jurist realizes the disposition demands made upon him by the tremendous increase in the caseloads, and accordingly maximum effort is being exerted to reduce the backlog in our hearing offices and to expedite the decision process. Then too, factors beyond our control, such as inadequate pre-hearing development and increased attorney representation, often delay the scheduling of cases and thereby make monthly quotas ill advised for judicial determinations. While not agreeing to any particular number of dispositions, we take pride in both the quality and quantity of our work and realize the need for continually improving both!

Again, let me thank you and your Subcommittee for the courtesies extended us during our recent appearance before you. We shall devote our best ability, energy and effort toward an expeditious and equitable solution of our common problem. Meanwhile, please remember that there is something worse than justice delayed and that is justice denied—so don't abandon the APA!

Respectfully,

ALBERT WATSON,
President,
Association of ALJs in the Department of HEW.

Mr. BURKE. I would like to have you, Mr. Watson, explain what the qualifications are for the administrative law judge hearing social security disability cases.

Mr. WATSON. It is set forth, Mr. Chairman, in Announcement 318 of the Civil Service Commission, and they include, among other things, 7 years' experience, some particular expertise in the area to which you are going, or seeking an appointment. Additionally, you must undergo a very rigid written and oral examination. You must prove your ability to study a case on a set of facts given to you, and to sit down and write a decision.

That test, for most, requires approximately 4 hours.

Additionally, you are interviewed by a panel of 3 people, 1 from the Civil Service Commission, and 1 in an executive position of the bureau to which you are seeking appointment, and in my particular case it would be Chief of the Field Division, and then a practitioner from the American Bar Association, and these 3 conduct an oral interview, asking you about your various qualifications, and, in addition, they make inquiry from 20 people, "vouchers," as they refer to them, and the questionnaires that they send out are rather detailed and voluminous.

In making your application, you submit at least 20 names, and they will go out and they can follow that up.

In addition, in submitting your application, you accompany with it a good sample of your legal work, so far as pleadings and such as that.

Additionally, the references must be lawyers and jurists who must be familiar with your particular experience.

Mr. BURKE. Who certifies you for the appointment?

Mr. WATSON. The Civil Service Commission sets up a register.

Mr. BURKE. Then who makes the appointment?

Mr. WATSON. The agency, when they need someone, they request from the Civil Service Commission, and the Commission certifies a certain number of people who are qualified on the register, the top of the register.

Mr. BURKE. Is there any difference between the test given to the Social Security ALJ's and the ALJ's for other agencies?

Mr. WATSON. Any difference?

Mr. Chairman, so far as I know, there is not, but I could not speak with any precision from a personal standpoint, because I never made application for any other agency.

Some of the agencies do require some particular expertise in their field, and the Civil Service Commission does maintain a separate register, as I recall, for some of the special agencies or regulatory agencies that require particular expertise.

Mr. BURKE. On the hearing examiners, would you go through the same explanation?

Mr. KROSS. I will make it very short. I know the committee staff has copies of an Announcement 318 of the Civil Service Commission.

Mr. BURKE. We know how it is done. We just want it in the record.

Mr. KROSS. I would ask that Announcement 318 of the Civil Service Commission and the SSA announcement for SSI hearing officers both be made a matter of record, because, Mr. Chairman, except for the requirement of 7 years instead of 4 and 6, the procedures are exactly the same, except for the 7 years' requirement.

They are exactly the same, copied verbatim, almost, as the procedure for examination showing qualifications, written demonstration, oral interview, grading, and being placed on the register after which the Secretary makes the appointment of the register, the same as in the CSC register.

Announcement 318 of the Civil Service Commission, and the SSA announcement for SSI hearing examiners, if that were made a part of the record, that would shorten my answer.

Anybody who looks at them will see that the qualifications and procedures are exactly the same except as to the 4 and 6 years as compared to 7 years. The only difference is that a different group of people did the judging.

Mr. BURKE. Without objection, both announcements will be included in the record.

[The material follows:]

BHA Announcement No. 74-4
Issued January 1974

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration
Bureau of Hearings and Appeals

ANNOUNCEMENT of EXAMINATION for ATTORNEY-EXAMINER

Organizational Title:

HEARING EXAMINER—SSI

Salary

GS-14 grade level—$24,247 to $31,519
GS-13 grade level—$20,677 to $26,878

The positions to be filled from this examination will be located in various cities throughout the United States.

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Chapter I
Introduction

The Bureau of Hearings and Appeals of the Social Security Administration will appoint Attorney-Examiners (Hearing Examiners—SSI) to conduct hearings and issue decisions under Title XVI of the Social Security Act, Public Law 92-603 (Supplemental Security Income). At this time it is anticipated that more than 250 individuals will be appointed to these positions.

All interested attorneys should carefully read this complete announcement before beginning to prepare an application. This is an open and continuous examination. The basic requirements are that an applicant must be a member of the Bar and have six years of qualifying experience for the GS-14 grade level or four years of qualifying experience for the GS-13 grade level. The burden of proof is on the applicant to establish that he or she clearly meets all the requirements of this announcement. Priority processing will be given to those applicants who file a complete application at an early date. Failure to comply with all the requirements of this announcement at the time of filing may result in delaying the further processing of that application. The appointment of other applicants to these positions will not be delayed pending the processing of incomplete applications or appeals resulting from ineligible ratings. All applicants will be considered without regard to race, religion, color, national origin, sex, political affiliations or any other nonmerit factor. (For general information on working for the Federal Government, see U.S. Civil Service Commission pamphlet No. 4, BRE-37, which may be obtained at most places where application forms are available.)

Every applicant in this examination will be considered for the grade level applied for as indicated on the application. Those applicants who are successful in all phases of this examination will be notified at the time of placement on a Register of Eligibles. (Phases B, C, and D of Chapter IV may be waived for an applicant who has established current eligibility on the Civil Service Commission Register of Administrative Law Judges under Announcement 318.) Selections for appointments will be made from the register under the applicable rules and regulations.

These Hearing Examiners will be appointed to preside over formal hearings required under Section 1631 of Title XVI of the Social Security Act (Supplemental Security Income). The cases to be heard and decided will involve benefits to the aged, blind, and disabled. In general, the Hearing Examiner may be required to:

1 Administer oaths, issue subpoenas, and take or authorize depositions.
2 Regulate the course of the hearing and prehearing conference.
3 Rule upon offers of proof and receive relevant evidence.
4 Dispose of procedural requests or similar matters.
5 Question witnesses (if necessary or desirable).
6 Consider all the evidence of record, the issues involved, and the arguments or contentions by the parties.
7 Determine credibility, make findings of fact and conclusions of law.
8 Issue initial decisions or make recommended decisions on the basis of reliable, probative, and substantial evidence of record.
9 Take any action authorized by agency rule consistent with applicable law.

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Chapter II

Basic Qualifying Experience

An applicant must have had progressively responsible experience which demonstrates his or her ability to conduct hearings in a dignified, orderly, and impartial manner; determine credibility of witnesses; sift and analyze evidence; apply agency and court decisions; prepare clear and concise statements of facts and law; exercise sound judgment; and demonstrate the judicial temperament required for successful performance in a judicial or quasi-judicial position.

To qualify for the GS-14 grade level in the examination, the applicant must have been, for at least six years immediately preceding the date of filing, duly licensed and authorized to practice as an attorney under the laws of a state, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the Constitution. To qualify for the GS-13 grade level in the examination, the applicant must have been an attorney for at least four years as described above. In addition, the applicant must clearly establish, in the aggregate, at least six years of qualifying experience (for the GS-14 grade level) or four years of qualifying experience (for the GS-13 grade level) in one or more of the following categories:

A Experience as judge, master, or referee of a court of record; or

B Experience as the head (or one of the heads) of a governmental regulatory body, responsible for (1) conducting, or supervising the conduct of, formal hearings and (2) making decisions on the basis of the record of such hearings; or

C Experience in a governmental regulatory body as an officer or employee presiding over formal hearings and making or recommending decisions on the basis of the record of such hearings; or

D Experience in the preparation of cases for, or their presentation at, formal hearings conducted by governmental regulatory bodies or court proceedings relating thereto; or

E Experience in the preparation of cases for and their presentation at trial in courts of record of unlimited and original jurisdiction or the preparation and presentation of appeals therefrom; or

F Experience in the active professional supervision and direction of subordinates engaged in functions described in D above; or

G Experience as a responsible official in a governmental regulatory body, whose duties require him to (1) review, analyze, evaluate, and recommend action to be taken by the head (or heads) of the body on decisions or recommend decisions on cases made by hearing officers on the basis of the record of formal hearings, or (2) render responsible assistance to the head (or heads) of the body in the preparation for, or hearing of, cases coming for a formal hearing before the head (or heads) of the body, or in the preparation of decisions by the head (or heads) of the body on such cases; or

H Experience in either a governmental body or in the private practice of law which involved the assimilation, analysis, and evaluation of complex facts; the interpretation and application of provisions of law, regulations, court decisions, and other precedents; the rendition of oral *and* written advice to employing officials or clients which demonstrates the ability to identify and effectively use pertinent precedents;

recognize new and complex problems, propose fair and equitable solutions in accordance with applicable law and regulations, *and* write clear, cogent opinions; or

I Experience in the active professional supervision and direction of subordinates engaged in functions described in H above.

Experience as a Military Judge (law officer) in a general court-martial, Member (or Judge) of Board (or Court) of Military Review, or military trial experience before the Armed Services Board of Contract Appeals will be acceptable. (Entering military service from qualifying experience may constitute an extension of qualifying experience.)

Credit will be given for all valuable qualifying experience, regardless of whether compensation was received or whether the experience was gained in a part-time or full-time occupation. Part-time or unpaid experience will be credited on the basis of time actually spent in qualifying experience.

Experience acquired (under G, H, and I) in handling the types of cases coming before governmental bodies (Federal, State or local) whose composition, practices, and procedures are not in substantial accord with the administrative procedure provisions of Subchapter II, Chapter 5 of Title 5 USC will *not* be acceptable.

The principal types of positions in which qualifying experience *is not obtained* are: Investigator; Rating Specialist; Conferee; Arbitrator; Mediator; Moderator; Professor; Clerk of Court; and Contract Officer.

Chapter III

One Year Level of Qualifying Experience

A. Level and Recency of Experience

An aggregate of one year of the applicant's qualifying experience must have been acquired within the 6-year period immediately preceding the date of filing of an application for the GS-14 grade level or an aggregate of one year of the applicant's qualifying experience must have been acquired within the 4-year period immediately preceding the date of filing of an application for the GS-13 grade level. This one year of qualifying experience must be of a level of difficulty, complexity, responsibility, and importance characteristic of the next lower grade in the Federal service. The quality or level of experience is determined by the nature, scope, degree of responsibility, importance, and complexity of cases handled. Experience in the handling of minor tort cases, routine divorce cases, traffic violation cases, and cases or matters of a similar nature will not be accepted as meeting the required level or quality of experience for either grade level.

B. Evidence of Qualifying Experience

The applicant must clearly establish that he or she has acquired the one year level of qualifying experience in judicial, trial, administrative law, or other legal experience. Every applicant *must* include with the application a listing of cases showing at least one year (210 workdays) spent on cases which in his or her opinion demonstrates the highest level of the applicant's qualifying experience. The listing of cases must show the following information for each case:

1 Title and citation.
2 Dates (approximate) between which participation took place.
3 Court, administrative body, or presiding officer who heard the case. (For other legal experience show responsible superiors.) For any court cited, show whether Federal, State or local and extent of jurisdiction such as original, appellate, unlimited or limited.
4 Brief statement of issue(s) involved.
5 Number of workdays spent in handling the case and in what capacity, i.e., judge, hearing officer, counsel, legal analyst, etc.
6 Names and current addresses of
  a Judge, official(s) of the administrative body, or presiding officer who heard the case. (Applicants engaging in other legal experience may show responsible superiors.)
  b Co-counsel or associate.
  c Opposing counsel, if applicable.
  d Counsel appearing in the case if applicant is in a judicial-type position.

Chapter IV

The Multiple Phases of the Examination

A. Review of Application

Every applicant must comply with *all* the filing requirements of this announcement. The application will be cancelled if it indicates that no contact is to be made with the applicant's employer. The Bureau of Hearings and Appeals will communicate no more than once with any applicant regarding minor deficiencies or omissions in the information submitted. If the applicant fails to make a timely reply which brings his application into full compliance with the terms of this announcement, an ineligible rating will be assigned and applicants will be notified of the reason(s) therefor. Applicants who have complied with all the filing requirements and meet the qualifying experience requirements will be processed through the next phase of the examination.

B. Qualification Inquiries

This phase of the examination consists of sending confidential qualification inquiries to individuals with whom applicant may have had professional contact and may know of his or her professional experience. Applicant should check to assure that 20 such names and addresses are included in the application. If appropriate, personal investigations may be conducted to resolve questions concerning the applicant's qualifications. The following rating factors are considered in evaluating the applicant: (1) quality of experience, (2) analytical ability, (3) ability to interpret and apply the law, (4) writing ability, (5) ability to secure facts from individuals, (6) ability to handle difficult situations, (7) ability to preside at and control hearings, (8) ability to make independent decisions, (9) ability to be objective and free from influence, (10) professional standing, and (11) demonstrated judicial temperament and poise. Based upon an evaluation of the application with supporting documents and an analysis of the responses to the inquiries, a basic rating is made to determine which applicants have attained a tentative passing grade. This rating is based upon a scale of 100. The Bureau of Hearings and Appeals has established 80 as the passing grade. Those applicants who score 80 or more will participate in the remaining phases of the examination. The applicants who do not attain a score of 80, exclusive of veteran preference, will be notified of a rating of ineligibility for failure to attain a passing grade.

C. Written Demonstration

The applicants who attain a score of 80 or more will be notified and scheduled to participate in a Demonstration of Ability to Write a Decision. The Demonstration is designed to "test" the applicant's ability to express himself or herself clearly, concisely, and convincingly in a written decision. The "test" will be given in various locations throughout the country. Travel will be at applicants' expense. Sufficient advance notice of the date scheduled for the "test" will be provided. If an applicant is unable to participate as scheduled, the application will be suspended and he or she will be rescheduled with a later group of applicants.

D. Panel Interview

The applicants who attain a score of 80 or more will also be notified to appear for a personal interview of approximately one hour duration. The interviews will be held in offices of the Bureau of Hearings and Appeals as soon as possible after the written demonstration. Applicants will receive advance notice; transportation will be at applicants' expense. If an applicant is unable to appear, the application will be suspended and he or she will be scheduled with a later group of applicants.

Chapter V

Final Rating

The final rating of eligibility or ineligibility will be issued by the Bureau of Hearings and Appeals within several weeks after the completion of the panel interviews. The final rating is based upon a careful evaluation of the information furnished by the applicant, responses to our confidential inquiries, investigations, written demonstration, and results of the interview. The successful applicants will be required to undergo a record check of National Agency and Local Law Enforcement files prior to being placed on the Register of Eligibles. Veteran preference points are assigned only to the successful applicant when his or her name is placed on the Register. All the names of the successful applicants will be placed on the appropriate GS-13 and/or GS-14 Hearing Examiner Register of Eligibles. The unsuccessful applicants will be notified of the rating of ineligibility.

Chapter VI

Maintaining Eligibility on the Register

In order to maintain eligibility on the Hearing Examiner Register(s), the eligible must update his or her experience no earlier than 18 months and no later than 21 months after the date of the notice of the final rating of eligibility and continue to do so every 18 to 21 months thereafter. To do so, the eligible must complete Standard Form 172 and attach thereto a listing of cases handled since filing in the examination, to demonstrate compliance with all current experience requirements of the examination. Failure to update with the stated periods will result in the removal of the eligible from the Register(s).

Chapter VII

Recompetition

An applicant who is rated ineligible at either grade level cannot refile in the examination earlier than one year after the date of previous filing. An applicant who receives an eligible rating may refile an application for a new rating at the same grade level no sooner than two years after the date of the previously filed application. The applications and documents submitted will be retained by the Bureau of Hearings and Appeals and be combined with any subsequent application filed. The applicant need not duplicate the former application but must comply with all the requirements of the Announcement including a current listing of cases.

Chapter VIII

How to File an Application (*Read Carefully*)

1 Complete Standard Form 171 and CSC Form 5001-ABC (also Standard Form 15 plus proof if claiming 10-point veteran preference). Send it with the necessary information required in paragraphs 4 and 5 below to:

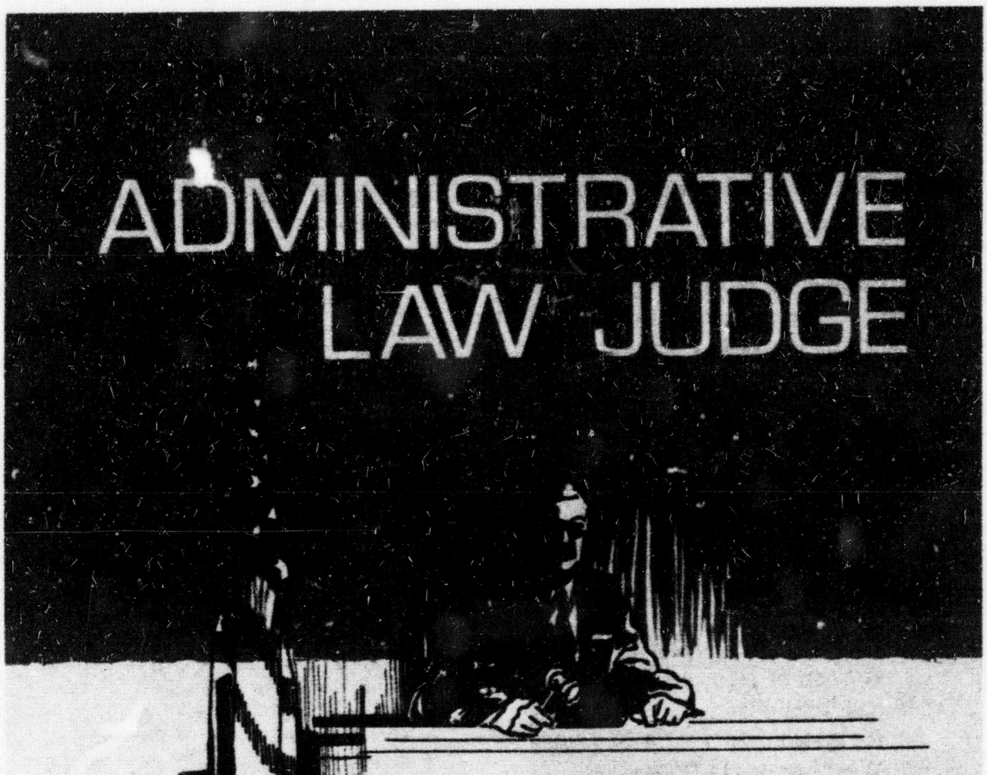
Department of Health, Education & Welfare
Bureau of Hearings and Appeals, SSA
SSI Task Force (326 Webb)
P.O. Box 2761
Washington, D.C. 20013

2 On the SF-171, be sure to give a full description of the nature, extent, and complexity of work performed to establish at least six years of qualifying experience if applying for the GS-14 grade level or at least four years of qualifying experience if you are applying for the GS-13 grade level of the examination.

3 Your application must show that within the applicable period (six years or four years) immediately preceding the date of filing, you acquired at least one year of qualifying experience at the next lower grade level (Federal Government classified) or at least one year of qualifying experience of a level of difficulty, complexity, responsibility, and importance comparable to at least the next lower Federal grade level (non-Federal or unclassified positions).

4 Submit a listing of cases showing at least one year or 210 workdays of experience you spent on cases (within the applicable six or four year period immediately preceding the date of filing) which demonstrates the highest level of your qualifying experience.

5 If your application together with the listing of cases does not contain the names and current addresses of at least 20 persons who have personal knowledge of your professional qualifications, submit a supplemental list of individuals such as employers, supervisors, judges, opposing counsels, associate counsels.



ADMINISTRATIVE LAW JUDGE

Positions in various
Federal regulatory bodies
in Washington, D.C. and
throughout the United States

[illegible]

ADMINISTRATIVE LAW JUDGE

The title of Hearing Examiner was changed to Administrative Law Judge on August 19, 1972. Since the provisions of this Announcement have not otherwise been changed, the title of Hearing Examiner used hereinafter is synonymous with Administrative Law Judge.

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INTRODUCTORY STATEMENT

Administrative Law Judges are employed by a wide variety of Federal regulatory bodies. Their positions are located in Washington, D.C., and throughout the United States.

The cases over which they preside vary in subject matter and in the nature of the causes involved.

In general, an Administrative Law Judge presides at formal hearings required by statute, and he may be required to make recommended or initial decisions on the basis of the record. His normal duties are to:

1. Administer oaths and affirmations.
2. Issue subpoenas authorized by law.
3. Rule upon offers of proof and receive relevant evidence.
4. Take or cause the taking of depositions whenever the ends of justice will be served thereby.
5. Regulate the course of the hearing.
6. Hold pre-hearing conferences for the settlement or simplification of the issues.
7. Dispose of procedural requests or similar matters.
8. Question witnesses, if necessary or desirable.
9. Consider the facts in the record and arguments and contentions made, or questions involved.
10. Determine credibility and make findings of fact and conclusions of law.
11. Recommend decisions or make initial decisions on the basis of reliable, probative, and substantial evidence on the record.
12. Take any actions authorized by agency rule consistent with the provisions of Title 5, United States Code.

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Hearing Examiners may also be required to perform additional duties not inconsistent with their duties as Hearing Examiners.

A person may become a Hearing Examiner only by appointment from the Hearing Examiner register established as the result of a competitive examination. The Hearing Examiner register is used only for appointments to Hearing Examiner positions. There is no probationary period to be served. A Hearing Examiner position may be filled by appointment from the register, or by the reinstatement, reassignment, transfer, or promotion of a person who has formerly received an appointment from the Hearing Examiner register. A Hearing Examiner is removable by the agency in which he is employed only for good cause established and determined by the U.S. Civil Service Commission after opportunity for hearing and upon the record thereof.

Decisions, based upon hearings presided over by persons appointed as a result of this examination, will range in scope and importance from those determining the rights and liabilities of individual citizens to those which will deeply affect the economic welfare of entire regions of the United States. For this reason, the United States Government is vitally interested in insuring that only the very best qualified applicants in this examination receive appointments.

The applicant should read with care this examination announcement in its entirety before he starts the preparation of his application. He should appreciate that, just as he is required to do in the advocacy of his cause at the bar, *he must fully establish that his application clearly satisfies all the examination standards, in full accordance with the procedural requirements set forth below.*

FILLING POSITIONS CLASSIFIED IN GRADES GS-13 AND GS-14

Only a small number of Hearing Examiner positions are classified at grades GS–13 and GS–14, and vacancies occur in these positions too infrequently to justify the establishment of registers for these grade levels. Therefore, ratings will not be assigned and registers will not be established at the GS–13 and GS–14 grade levels.

When a vacancy occurs in a position classified at grade GS–13 or GS–14, the Commission will issue a certificate of names taken from the GS–15 register.

REQUIREMENTS

Quality of Experience

An applicant must have had progressively responsible experience which demonstrates his ability to conduct hearings in a dignified, orderly, and impartial manner; determine credibility of witnesses; sift and analyze evidence; apply agency and court decisions; prepare clear and concise statements of fact, law, and order; and exercise sound judgment. Finally, an applicant must conclusively demonstrate that he has the judicial temperament and poise required for successful performance in a judicial or quasi-judicial position.

More specifically, the following rating factors are considered in the determination of an applicant's eligibility:

1. Complexity, responsibility, variety, and difficulty of qualifying experience.
2. Ability to analyze and evaluate evidence.
3. Ability to interpret and apply laws, rules, regulations, and legal precedent.
4. Ability to write clearly and concisely statements of fact and law, recommendations, and orders.
5. Ability to secure facts from individuals through observation and interviews under difficult conditions.
6. Ability to handle difficult situations when presenting or preparing cases.
7. Ability to preside at and control meetings, conferences, or hearings.
8. Ability to make independent decisions in important matters.
9. Ability to be objective and free from influence of any kind.
10. Professional standing enjoyed by the applicant among the members of his profession.
11. Knowledge and experience in technical subject-matter fields.
12. Demonstrated judicial temperament and poise.

Qualifying Experience

4 An applicant, at the time of filing must be, and for a period of at least 7 years prior thereto must have been, duly licensed and authorized to practice as an attorney under the laws of a State or the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the Constitution. (This requirement, however, will not be applied in acting on *noncompetitive* actions involving individuals who have already received appointments as Hearing Examiner in the Federal service from the competitive register.) In addition, an applicant must clearly establish that he has had, in the aggregate, at least 7 years of experience in one or more of the categories listed below:

A. Experience as judge, master, or referee of a court of record; *or*

B. Experience as the head (or one of the heads) of a governmental regulatory body, responsible for (1) conducting, or supervising the conduct of, formal hearings *and* (2) making decisions on the basis of the record of such hearings; *or*

C. Experience in a governmental regulatory body as an officer or employee presiding over formal hearings and making or recommending decisions on the basis [illegible] record of such hearings; *or*

D. Experience in the [illegible] of cases for, or their presentation at formal hearings [illegible] governmental regulatory bodies or court proceedings relating thereto (an applicant will receive credit for participation in the *preparation* of a case *only if* he shows that he was either *solely or jointly responsible for determining* whether the preparatory work *is acceptable for use*); *or*

E. Experience in the preparation of cases for *and* their presentation at trial in courts of record of unlimited and original jurisdiction or the preparation *and* presentation of appeals therefrom; *or*

F. Experience in the active professional supervision and direction of subordinates engaged in functions described in Category D above; *or*

G. Experience as a responsible official in a governmental regulatory body, whose duties require him to (1) review, analyze, evaluate, and recommend action to be taken by the head (or heads) of the body on decisions or recommended decisions on cases made by hearing officers on the basis of the record of formal hearings, or (2) render responsible assistance to the head (or heads) of the body in the preparation for, or hearing of, cases coming for a formal hearing before the head (or heads) of the body, or in the preparation of decisions by the head (or heads) of the body on such cases.
Experience in cases in governmental bodies whose practices and procedures are not in substantial accord with the administrative procedure provisions in subchapter II of Chapter 5 of Title 5, United States Code, is *not* qualifying.

Qualifying experience, therefore, consists of responsible participation in the preparation, presentation, or hearing of formal cases in governmental regulatory bodies or court proceedings relating thereto, or actual participation in the preparation *and* trial of cases in courts of record of unlimited and original jurisdiction, or the preparation *and* presentation of appeals therefrom, or in the hearing of such cases. Only trial experience gained in courts of record of unlimited and original jurisdiction or the preparation *and* presentation of appeals therefrom involving cases other than routine misdemeanors, probate, domestic relations, minor tort matters, and cases of a similar nature will be accepted as qualifying.

In addition, there are other types of experience not considered qualifying. Listed below are the titles of the principal types of positions in which qualifying experience is not obtained:

1. Investigator, under any job title.

2. Adjudicator.
3. Rating Specialist.
4. Claims Reviewer.
5. Insurance Adjuster.
6. Conferee.
7. State Unemployment Insurance Supervisor.
8. Arbitrator.
9. Mediator.
10. Moderator.
11. Teacher or Professor.
12. Hearing Officer in informal or conference proceedings.
13. Clerk of Court.
14. Legal Consultant.
15. Officer of any Court not of record.
16. Contract Officer.

Administrative Law or Trial Experience

The applicant must show that, in the aggregate, at least 2 of the 7 years of experience described under "Qualifying Experience" above, were in the field of administrative law, or in the actual preparation *and* trial of cases in courts of original and unlimited jurisdiction or the preparation and presentation of appeals therefrom, or in the hearing of such cases.

For the purpose of this examination, the field of administrative law consists of:

1. Formal proceedings before Federal regulatory bodies, or
2. Formal proceedings before State or local regulatory bodies, involving issues fully comparable to those before Federal regulatory bodies, or
3. Actions in courts of record involving reviews or appeals from, or enforcement of, the decisions made on these formal proceedings by regulatory bodies, or
4. Injunctive proceedings brought in a court of record relating to a formal proceeding or a prospective formal proceeding before a Federal regulatory body, or
5. Injunctive proceedings brought in a court of record relating to a formal proceeding or a prospective formal proceeding before a State or local regulatory body.
6. Actions in courts of record involving issues fully comparable to those in formal proceedings before Federal regulatory bodies, or in fully comparable formal proceedings before State or local regulatory bodies.

The applicant must show clearly that he gained this experience in one or more of the capacities described in categories A through G under "Qualifying Experience" above.

Principal types of cases considered comparable to those coming before Federal regulatory bodies are shown on following page:

Cases involving the approval or prescription of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor, or of valuations, costs, or accounting, or marketing or other practices.

Examples:

Cases involving reasonable rates for transportation or other services of common carriers or industries subject to regulations.

Cases involving purchases, leases, mergers, consolidations, reorganizations, recapitulations, integrations, or financing of common carriers or public utilities.

Cases involving valuations, reproduction costs, and fair rate of return on capital of a common carrier or public utility.

Cases involving the issuance of regulations fixing and establishing a reasonable standard of identity for food.

Cases involving prosecution or defense of alleged violations of public laws or regulations of public bodies respecting labor, agriculture, political activity, trade, or commerce, including money claims arising therefrom or declaratory proceedings.

Examples:

Cases involving violations of or noncompliance with laws, rules, and orders pertaining to the regulation of public utilities or other entities, or to labor, trade, or agriculture.

Cases involving charges of unfair trade or labor practices.

Cases involving alleged violations of the postal fraud, lottery and antiobscenity statutes.

Cases involving participation of Government employees in prohibited political activity.

Cases involving civil rights matters.

Cases involving antitrust matters.

Cases involving admiralty matters.

Cases involving the grant, revocation, or amendment of a public license (other than those involving common occupations), permit, certificate, approval, registration, charter, or membership, involving difficult and complex issues of fact or law.

Examples:

Cases involving revocation, suspension, or annulment of licenses of air pilots, merchant mariners, distilleries, wineries, or of common carriers or public utilities.

Cases involving the grant or revocation of licenses for nuclear production and utilization facilities.

Cases involving the grant or annulment of licenses relating to the use or disposition of public lands and resources.

Cases involving the licensing, financing, and regulation of investment and lending practices of business investment companies.

Cases involving denial, suspension, or revocation of a certificate of registration of any person who recruits, solicits, hires, furnishes, or transports migrant workers for farm employment.

Cases involving the grant, denial, or recovery of money payments or other benefits upon a hearing required by law.

Examples:

- Cases involving claims for old age and survivors insurance benefits, the settlement of estates of Indians, or ownership of vested property.
- Cases involving disability allowances, insurance claims, or other privileges.

In determining whether a case which comes before a State or local regulatory body is comparable to one coming before a Federal regulatory body, a direct comparison is made of the subject matter and causes in the case with the subject matter and causes of the cases which come for hearing before Federal regulatory bodies. For example, interstate transportation rate cases come before the Interstate Commerce Commission; intrastate transportation rate cases which come before State regulatory bodies and local transportation rate cases which come before local regulatory bodies are cases comparable to those coming before the Interstate Commerce Commission. Participation in such State or local cases, therefore, will constitute administrative law experience as defined above.

However, participation in formal hearings accorded employees of some State governments on the basis of charges brought against them will not constitute administrative law experience, since these cases are not formal proceedings in the Federal service.

Recency of Experience

In order to establish eligibility, an applicant must clearly establish that he has acquired, in the aggregate, 2 years of experience in the field of administrative law, as described above, or in the actual preparation *and* trial of cases in courts of original and unlimited jurisdiction or the preparation *and* presentation of appeals therefrom, or in the hearing of such cases, within the 7-year period immediately preceding the date of his application.

Level of Qualifying Experience

The grade of Hearing Examiner position for which an applicant is considered qualified will be determined by the quality of his experience which falls in one or more of the categories set forth under "Qualifying Experience" described on page 4. This is shown by the scope and level of his responsibilities, and the importance and complexity of the cases which he has handled. Thus, to qualify at each grade level of Hearing Examiner position, at least 1 year of the applicant's qualifying experience must have been gained in the 7-year period preceding the date of his application and must have been of a level of difficulty, complexity, responsibility, and importance characteristic of at least the next lower grade in the Federal service. However, an applicant *may be qualified* for eligibility at the GS–16 grade level on the basis of the successful completion of *2* years of qualifying experience at or comparable to the GS–14 grade level in the Federal service. Such experience must have been gained within the 2-year period preceding the date of his application.

The quality of experience gained in trial practice is determined by the importance and complexity of the cases prepared and tried by the applicant. Experience in routine misdemeanor cases, probate, domestic relations, minor tort matters and cases of a similar nature will not be accepted as meeting the quality of experience required for either grade level.

Special Qualifications for Filling Certain Hearing Examiner Positions

In filling Hearing Examiner positions in certain Federal regulatory bodies, prior consideration is given to eligible applicants whose administrative law experience includes participation in cases comparable to those coming before these bodies. See the section entitled "Special Qualifications for Positions in Certain Federal Regulatory Bodies," for the names of these Federal regulatory bodies, together with a statement of the special qualifications required for each agency's Hearing Examiner positions. (These special qualifications, however, will not be required in acting on *noncompetitive* actions involving individuals who have previously received appointments as Hearing Examiners in the Federal service from a competitive register.)

As indicated in these statements, an applicant is required to demonstrate that the 2 years of experience in each legal specialty has been obtained within the 7 years immediately preceding the date of his application. The cases in the legal specialty in which he has participated must be cited by him in the list described under "Submission of Examination Material" on page 10; and the number of work days spent by him in handling these cases must, in the aggregate, equal 2 years.

Creditability of Service with Armed Forces

Time spent by an applicant in the Armed Forces shall be considered in either of the two following ways, depending upon which will be of more benefit to the applicant:

A. Such service may be considered as an extension of the employment in which the applicant was engaged immediately prior to his entrance into the military service, *or*

B. Such experience may be considered on the basis of actual duties performed by the applicant in the military service.

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As an example, an attorney who adjusts claims for an insurance company (an experience which is *not* qualifying) enters military service; and, for the entire period of service, he represents the government as counsel in the preparation and presentation of cases before the Armed Services Board of Contract Appeals. His military service is accepted as qualifying experience, since this body's composition and practice are in substantial accord with the administrative procedure provisions in subchapter II of Chapter 5 of Title 5, United States Code.

In further exemplification, an attorney whose practice consists of the preparation and presentation of cases before the National Labor Relations Board (an experience which is qualifying) enters military service; and, for the entire period of service he acts as presiding officer at courts-martial. In view of the fact that participation in courts-martial as presiding officer or member of the court other than law officer in general courts-martial is *not* qualifying experience for the purpose of this examination, his military service is credited as an extension of his civilian practice.

Part-time or Unpaid Experience

Credit will be given for all valuable qualifying experience, regardless of whether compensation was received or whether the experience was gained in a part-time or full-time occupation. Part-time or unpaid experience will be credited on the basis of time actually spent in appropriate activities. Applicants wishing to receive credit for such experience must indicate clearly the nature of their duties and responsibilities in each position and the number of hours a week spent in such employment.

SUBMISSION OF EXAMINATION MATERIAL

The applicant is required to submit a complete Standard Form 171, Personal Qualifications Statement, in which *all* items of information requested therein are furnished. *He must also include the date and jurisdiction of his admission to the bar.*

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Only brief descriptions of nonqualifying experience need be furnished. However, all periods of employment claimed by the applicant as having afforded him qualifying experience must be described specifically and in detail in order to convey a full and accurate understanding of the nature, variety, complexity, responsibility, and difficulty of such experience. Descriptions of experience such as "Private Practice of the Law," "House Counsel for the XYZ Corporation," "Assistant Attorney General for the State of Illinois," or "Attorney at Law, handling matters of extreme complexity involving difficult problems in many legal fields" are uninformative; in reviewing an application, periods of service which are so described will be disregarded on the assumption that the applicant did not intend to claim such service as qualifying experience.

The applicant's statement of experience must clearly establish that he has obtained, in the aggregate, the *full 7 years of qualifying experience* required for *eligibility*. Therefore, in describing a period of employment consisting of a combination of qualifying and nonqualifying experience, it is essential that he indicate how his time was divided between the two types of experience. If this information is not furnished, no part of this period of employment will receive credit as qualifying.

The applicant must also clearly establish that he has obtained, in the aggregate, the *full 2 years of administrative law or actual trial or judicial experience* required for eligibility, and that the time of obtaining this experience *satisfies the requirements* set forth under "Recency of Experience" above. The Commission does *not* accept the unsubstantiated claim of *any* applicant that he has obtained this administrative law or trial experience. In proof of his claim, *every* applicant must include in his application a list, *in chronological order*, of *a sufficient number of administrative law cases* in which he has participated or *court cases which he has prepared and tried, or heard*, to demonstrate *2 full years* (400 workdays) within the 7-year period immediately preceding the date of his application. He must show for every case so listed:

1. Title and citation.
2. Dates between which participation took place.
3. Brief statement of issues involved.
4. Regulatory body or court hearing case. Note: For each court so cited, indicate whether Federal, State, or local; extent of jurisdiction (limited or unlimited, original or appellate).
5. Number of workdays spent in handling case, and in what capacity, i.e., judge, attorney, etc.
6. Names and current addresses of
   (a) Hearing Officer of regulatory body or of judge who heard case
   (b) Co-counsel, if any
   (c) Opposing Counsel
   (d) Names of Counsel appearing in case if applicant claims qualifying experience in a judicial type position.

The applicant is also required to submit the details listed below *regarding 2 of the cases referred to above* which, in his opinion, are the most important ones in which he has participated. (If the applicant satisfies the administrative law, actual trial, or judicial requirements of this announcement by listing only one case, he may submit details on only that case). If the applicant claims that his experience satisfies any of the special qualifications for filling specific Hearing Examiner positions which are described beginning on page 18, at least one of the cases must have been in the field of the legal specialty involved.

1. The precise nature and extent of participation.
2. Full statement of issues involved and a description of the problem.
3. Outline of arguments made.
4. Summary of technical, economic, or other data presented, including sources, manner of analysis, and uses, written decisions or opinions, or other papers prepared by applicant in one case.
5. Briefs, Memoranda of Law.

To assist the rating panels in determining the ability of the applicant to write clearly, concisely, and convincingly, the applicant shall submit with each such written decision or opinion a *verification* in the form of a signed statement of the extent of his *personal* involvement in and his responsibility for the preparation of the document; and the names and current addresses of those persons, if any, who worked with him in the preparation of the document.

Detailed descriptions of only 2 administrative law cases or 2 court cases which the applicant actually tried or heard should be submitted, one of which is to reflect the highest level of his qualifying experience.

It is incumbent on the applicant to make sure that his application and related papers contain the *names and current addresses of at least 20 individuals* who have personal knowledge of his experience and professional qualifications, so that confidential inquiries may be made of a number of them. Ordinarily, the applicant will find that he has listed at least this number in connection with his employment record and the cases in which he has participated. However, if an examination of his papers indicates to him that this is not so, he is required to add a sufficient number of names to increase the total to 20.

The Civil Service Commission will communicate no more than *once* with an applicant regarding minor deficiencies or omissions (non-fatal) in the information submitted by him. If the applicant does not submit a *timely* reply which causes his application as so amended to *comply fully* with all of the filing requirements set forth above, an ineligible rating will be assigned to his application.

Finally, it is essential that information regarding the nature and quality of the applicant's service in his current employment be obtained from informed and reliable sources. This information is usually obtained from the applicant's employer or supervisor or, if he is a partner in a firm, from one or more of his associates. Therefore, if an applicant indicates that he does not want confidential inquiries to be made of such persons, in connection with his current employment, his application will be canceled.

THE RATING PROCESS

Basic Rating

A review will be made of the experience of each applicant as described by him in his application. After this review has been completed, applicants not meeting the requirements of this announcement will be assigned an ineligible rating and so notified.

In the case of each applicant who is found to have clearly met the requirements of this announcement, confidential inquiries will be sent to a number of the individuals whose names were furnished by him; confidential inquiries may also be sent to other individuals selected by the Commission.

The Civil Service Commission will conduct a full personal investigation of an applicant's qualifications when this becomes necessary in order to resolve questions raised regarding his eligibility, including those raised in responses received in reply to confidential inquiries.

Based on an evaluation of the material submitted by the applicant and on the information obtained from confidential inquiries, a basic rating is made to determine which applicants are eligible for appointment. This rating is based on a scale of 100. Because of the limited number of Hearing Examiner positions for which appointments are needed, the passing grade for this examination will be set at a figure that the Commission determines will produce an adequate register of eligibles. This means that the Commission will determine how many names are needed on the Hearing Examiner register and will establish as the passing grade for the examination such numerical rating as will result in that number being rated eligible for appointment. In addition, from among those applicants who are rated eligible for appointment, the Commission will make the determination regarding the special qualifications for appointment in certain agencies discussed on pages 9 and 18. Each applicant will be notified of his basic rating and of any special qualifications assigned to his application.

Demonstration of Ability to Write a Decision

Those applicants who attain a passing grade on the basic rating must demonstrate their ability to write a decision. This demonstration will require about 6 hours. For applicants residing in the Washington Metropolitan Area, the demonstration will be administered in the Commission's Central Office. For other applicants the demonstration will be administered at available points located near their places of residence. Applicants will be required to travel at their own expense.

The demonstrations will be held as frequently as necessary to meet the needs of the service. All applicants who (1) have filed *complete* applications on or before the date on which the Commission decides that the needs of the service require the scheduling of a demonstration and (2) who are assigned a passing grade at the basic rating will be given the demonstration at the same time. All applicants who file *complete* applications subsequent to the date on which the Commission decides that the needs of the service require the scheduling of a demonstration and who are assigned a passing grade at the basic rating, will be given the demonstration at a later date as determined by the Commission.

The demonstration, primarily, is to test an applicant's ability to express himself clearly, concisely, and convincingly in a written decision. For the purpose of the demonstration, it is considered that there is no "right" or "wrong" answer to the problem presented to the applicant.

The applicant will be given sufficient advance notice to insure that he will be able to arrange to take part in the demonstration on the appointed day. If it becomes impossible for the applicant to participate, his application will be suspended and he will be allowed to take part in the next scheduled demonstration.

Oral Interview

All applicants who attain a passing grade on the basic rating will also be required to appear for individual interviews with respect to the qualifications required for proper performance on the job. These interviews, which will last for about 1 hour, will be held by panels at the Commission's Regional Offices, its Central Office in Washington, D.C., and its Offices in Alaska, Hawaii, and Puerto Rico. The panels will consist of three persons specially designated by the Commission for such purpose and for evaluating each applicant's qualifications. The interviews will be held approximately 1 month after the date on which the applicant participated in the demonstration of his ability to write a decision. If it is impossible for him to appear as scheduled, his interview will be rescheduled if this can be done within the limits of the panel's calendar; otherwise, his application will be suspended and he will be allowed to take part in the next scheduled interviews. Applicants who are scheduled for oral interviews will be required to travel at their own expense.

Final Rating

Before an applicant is placed on the register, he will be required to undergo a National Agency and Local Law Enforcement Investigation, in connection with which he may be required to submit additional information.

A final rating will be made by the Commission, based on a careful evaluation of the information furnished by the applicant with his application, information obtained in response to confidential inquiries, investigations, results of his demonstration of his ability to write a decision, and results of the oral interview, and on the final report of the special panels. At this time, applicants will be assigned points for veteran preference, in the cases of those who are entitled thereto in accordance with the provisions of Title 5, United States Code 3309 and registers established.

Each competitor will be rated for the grades or salary levels which he will accept and for which he is qualified. In no case will an applicant be given a rating in any grade for which the compensation is less than the minimum acceptable salary as stated in his application.

Issuance of Certificates

Only those applicants to whose applications final eligible ratings have been assigned will be considered for certification to fill Hearing Examiner positions. The issuance of certificates will not be delayed pending completion of any phase of the rating of an applicant's application or pending decision on an appeal filed by an applicant from a rating.

MAINTAINING ELIGIBILITY

An applicant with a final eligible rating must bring his experience up to date by filing Standard Form 172, Supplemental Experience and Qualification Statement, no earlier than 12 months and no later than 18 months from the date on which he was notified of his eligibility in this examination. Thereafter, he is required to repeat this process no earlier than 12 months and no later than 18 months from the date on which he last brought his application up to date. In bringing his application up to date, an applicant must attach to his Standard Form 172 a list of all cases (whether in the field of administrative law or in other fields of law) in which he has participated since he filed his application in the examination. The list must be prepared in the manner prescribed in the second paragraph beginning on page 11 above. An applicant's failure to bring his experience up to date within the stated periods will result in the removal of his name from the register; in this event, he cannot re-file his application for the purpose of regaining eligibility during the 2-year period following the latest date on which he was required to update his application.

In bringing his application up to date, an applicant must continue to 15
satisfy the provisions found under "Recency of Experience" set forth above. If he is unable to do so, his name will be removed from the register.

In addition, in order to retain credit for any special qualifications previously assigned to his application, he must show that his participation in cases falling within the legal specialty involved continues to satisfy the "Recency of Experience" requirement set forth under "Special Qualifications for Filling Certain Hearing Examiner Positions" on page 9. No other re-rating, however, will be conducted on the basis of this additional information.

An applicant who receives a final eligible rating may file a new application (Standard Form 171) for a new rating at the same grade level no sooner than 2 years after the date on which he was notified of the previous eligible rating.

An applicant who files a new application (Standard Form 171) for a new rating at the same grade level is required to submit the new application in the manner described above under "Submission of Examination Material," describing his experience from the date on which he filed his old application or the date on which he last brought his experience up to date. With his application he must file a list of all cases (whether in the field of administrative law or in other fields of law) in which he has participated since he filed his application in the examination or since he last brought his application up to date. This listing must be prepared in the manner prescribed in the second paragraph beginning on page 11 above. The application and listing of cases must contain the names and current addresses of at least six individuals who have personal knowledge of his experience and professional qualifications, so that confidential inquiries may be made of a number of them, as well as others. The new application, when combined with the old one, must satisfy all requirements set forth above, and it will be processed in the same manner as that set forth above under "The Rating Process."

Recompetition

Any applicant who filed a Hearing Examiner application previous to the issue date of this revised announcement and received a notice of cancellation or ineligibility may now re-file his application under this revised announcement. The new application must conform with all of the requirements of this announcement.

An applicant who files under the Revised announcement and who receives an ineligible rating may re-file no sooner than 1 year after the date on which he filed in this examination.

Note: In view of this restriction, an applicant *should not* limit his availability to a higher grade level if he has *any* doubts as to his ability to satisfy the qualification requirements for it. If he does so, and receives an ineligible rating, he will not be able to obtain consideration at a lower grade level until the conclusion of the previously stated 1-year period.

EQUAL EMPLOYMENT OPPORTUNITY

All applicants will be considered without regard to race, religion, color, national origin, sex, political affiliations, or any other nonmerit factor.

For information about citizenship, physical abilities required, veteran preference, and other general information, see Civil Service Commission Pamphlet No. 4, "Working for the U.S.A.," which may be obtained at most places where applications are available.

HOW TO APPLY

What to File

To apply for this examination, submit the forms and material listed below.

1. Standard Form 171 and related papers (see explanation found under "Submission of Examination Material" on page 10).
2. Civil Service Commission Form 5001–ABC.
3. Standard Form 15, with documentary proof required therein, if claiming 5-point veteran preference based on other than wartime service, or 10-point veteran preference (disability, widow, wife, or mother preference). Documentary evidence will be returned to applicants.

Where to Get Forms

The forms mentioned above may be obtained from (1) Job Information Centers in many large cities throughout the country (their addresses are listed on pages 28 through 36 in Pamphlet 4), (2) many post offices except in cities where the Job Information Centers are located, or (3) the United States Civil Service Commission, 1900 E Street NW., Washington, D.C. 20415.

When and Where to File

Applications may be filed in this examination at any time. Send applications to the United States Civil Service Commission, 1900 E Street NW., Washington, D.C. 20415. Attention: Office of Hearing Examiners.

LIST OF AGENCIES EMPLOYING HEARING EXAMINERS

Agency	*Grade of Position*
Department of Agriculture ✓	GS–16
Atomic Energy Commission	GS–16
Civil Aeronautics Board ✓	GS–16
Federal Communication Commission ✓	GS–16
Federal Maritime Commission ✓	GS–16
Federal Power Commission ✓	GS–16
Federal Trade Commission 374-5256	GS–16
Interstate Commerce Commission ✓	GS–16
Department of Labor, Reg. Director, 5941	GS–16/15
Maritime Administration, Department of Commerce	GS–16
National Labor Relations Board ✓	GS–16
National Transportation Safety Board, Department of Transportation 3576	GS–16
U.S. Postal Service	GS–16
Securities and Exchange Commission ✓	GS–16
U.S. Civil Service Commission	GS–16
U.S. Coast Guard, Department of Transportation ✓	GS–15
Internal Revenue Service, Department of the Treasury ✓	GS–15
Office of the Secretary, Department of the Interior	GS–16
Social Security Administration, Department of Health, Education, and Welfare	GS–15
Office of the Secretary, Department of the Interior (Indian Probate)	GS–14
+ Louis Occupational Safety and Health Review Commission 374-5861	GS–16
Postal Rate Commission	GS–17
Environmental Protection Agency, Reg. Counsel. 5494	GS–16/15

SPECIAL QUALIFICATIONS FOR POSITIONS IN CERTAIN FEDERAL REGULATORY BODIES

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As set forth under "Special Qualifications for Filling Certain Hearing Examiner Positions," on page 9 of the examination announcement, prior consideration in filling Hearing Examiner positions in certain Federal regulatory bodies is given to eligible applicants whose administrative law experience includes participation in cases comparable to those coming before these bodies. Listed below are the special qualifications for the positions in these bodies.

In order to obtain prior consideration in filling a position in one of these bodies, an eligible applicant must have clearly established in his

application and related papers, in the manner prescribed in the examination announcement, that he has acquired the special qualifications for that position within the 7 years immediately preceding the date of his application.

When it is found that the register does not contain the names of a sufficient number of eligibles possessing the special qualifications for consideration by an agency, certification will then be made in regular order from the register.

Department of Agriculture

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory bodies at the Federal, State, or local level, involving issues arising in the enforcement, application, or administration of marketing orders pertaining to agricultural commodities or food distribution regulations such as those pertaining to the control of commodity exchanges and stockyards.

Civil Aeronautics Board

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory agencies at the Federal, State, or local level, in the field of air transportation, involving matters relating to rates, finance, or operating authorities. In the absence of a sufficient number of eligible applicants with the foregoing experience, priority in certification will next be given to those with similar experience in the field of surface transportation.

Federal Communications Commission

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory bodies at the Federal, State, or local level, in the field of communications law.

Federal Maritime Commission

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, involving causes arising in the field of public utilities law. These cases must have originated before governmental regulatory bodies at the Federal, State, or local level.

Federal Power Commission

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, involving causes arising in the field of public utilities law. These cases must have originated before governmental regulatory bodies at the Federal, State, or local level.

Internal Revenue Service, Department of the Treasury

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory agencies, involving questions arising under the Federal alcohol and tobacco tax laws or under substantially similar laws at the State or local level; more specifically, the questions must have involved the levy and collection of taxes on these commodities; control of their production, distribution, and sale; or practices followed in their labeling and advertising.

Interstate Commerce Commission

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory agencies at the Federal, State, or local level, in the field of surface transportation (including transportation by rail, motor carrier, or water), involving matters relating to rates, finance, operating authorities, and safety. In the absence of a sufficient number of eligible applicants with the foregoing experience, priority in certification will next be given to those with similar experience in the field of air transportation.

National Labor Relations Board

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory bodies at the Federal or State level, arising in the field of labor law and involving the enforcement of governmental policy encouraging collective bargaining and the right of free association in connection with employer-employee relations.

An applicant who has fully established his general eligibility under the terms of the examination announcement is permitted to submit evidence of his participation, within the 7 years immediately preceding the date of his application, in the arbitration of labor disputes in connection with the provisions of a collective bargaining contract or statutory machinery, as partial or complete satisfaction of the special qualifications requirement set forth above.

Securities and Exchange Commission

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory bodies at the Federal, State, or local level, in the field of securities financing and involving the public issuance of securities or the trading of securities. In connection with this practice, the applicant must have acquired and applied:

1. An understanding of the corporate financing process as related to the public issuance of securities; and
2. An understanding of the appraisal or evaluation of annual reports of corporations, including financial statements; and
3. An understanding of basic accounting theories and principles and of their application; and
4. An understanding of current trading techniques in the securities markets.

Social Security Administration, Department of Health, Education, and Welfare, for positions located in Puerto Rico

A current working knowledge of both the English and Spanish languages (knowledge need not have been acquired within the 7 years immediately preceding date of application).

U.S. Coast Guard, Department of Transportation

Two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory bodies, in the field of admiralty and maritime law and involving the interests of seamen or the shipping industry. In the absence of a sufficient number of eligible applicants with the foregoing experience, priority in certification will next be given to eligible applicants with 2 years of experience in hearing formal cases coming before governmental regulatory bodies, or as a judge or justice of a court of record.

There are no special qualifications required for Hearing Examiner positions in the Federal regulatory bodies listed below:

Atomic Energy Commission
Civil Service Commission
Environmental Protection Agency
Federal Trade Commission
Maritime Administration,
  Department of Commerce
National Transportation Safety Board,
  Department of Transportation
Occupational Safety and Health Review
  Commission
Office of the Secretary,
  Department of Interior
U.S. Postal Service
Postal Rate Commission
Social Security Administration,
  (Department of Health, Education, and Welfare) (Positions other than those located in Puerto Rico)

Mr. **Burke**. Let me ask you this.

Mr. **Kross**. Yes?

Mr. **Burke**. The Social Security administrative law judges have permanent appointments, is that correct?

Mr. **Kross**. Yes, sir.

Mr. **Burke**. Now, the hearing examiners, how are you appointed?

Mr. **Kross**. It is a permanent appointment so long as Congress permits us to exist.

Mr. Burke. You have tenure.

Mr. **Kross**. It is a career appointment in ordinary civil service. It does not have the independence, as has been pointed out, of an administrative law judge.

Mr. **Burke**. Now, the black lung administrative judges, Mr. Reed do you want to go through the whole explanation of how they are appointed?

Mr. **Reed**. Very well, Mr. Chairman.

The black lung judges were initially recruited by the Bureau of Hearings and Appeals with a special announcement in 1972. The announcement was somewhat simpler in stating the qualifications for black lung judges. However, the substantive effect of the requirement for experience was identical to the requirements that were then in existence for administrative law judges through the Civil Service Commission, except the black lung judges had to have 6 years of the requisite kind of trial experience or legal experience, what have you.

The original classes of black lung judges were recruited and hired under that announcement. It is my understanding that all the black lung judges that have been appointed recently, numbering probably one-half of our corps, were persons who had qualified for the SSI register at the GS–14 level, and so those more recent black lung judges were, in effect, qualified through the SSI procedures.

Now, as a practical matter, all black lung judges now have also qualified as SSI hearing examiners by submitting an application, and going through exactly the same procedures again to qualify for a SSI hearing examiner appointment, except that a few black lung judges have been tendered permanent SSI hearing examiner appointments without going for a personal interview on the theory, presumably, that since they were functioning within the Bureau of Hearings and Appeals, their qualifications were acceptable to the administration.

Mr. **Burke**. What is the grade on the hearing examiners?

Mr. **Kross**. GS–13.

Mr. **Burke**. And Mr. Watson?

Mr. **Watson**. Ours are GS–15.

Mr. **Reed**. Ours are GS- 14.

Mr. **Burke**. Does the Civil Service Commission supply registers for black lung ALJ's?

Mr. **Reed**. No, Mr. Chairman.

Mr. **Burke**. Who supplies that?

Mr. **Reed**. The register was compiled by the Social Security Administration for its own procedures.

Mr. **Burke**. Were you supposed to be under the APA?

Mr. **Reed**. The hearings are conducted under the APA, but the appointments were made under special statutory authority authorizing the Secretary to appoint temporary administrative law judges to hear Federal Coal Mine Health and Safety Act cases.

Mr. **Watson**. Mr. Chairman, may I make one observation? Personally, I do not want to see another level of administrative law judges appointed. I think we should move as quickly as we can in an orderly fashion to a single ALJ. I think everyone is in accord with that. Certainly, that is one thing on which we will all agree, that we need one single ALJ, and I think further that I can nail another peg down, that we all want that ALJ to be an APA-appointed ALJ, and we all can secondly agree on that that we want it to be an APA–ALJ.

Thirdly, I believe we would all agree that we would want the qualifying procedures handled by an individual agency, if you will, with the expertise of Civil Service.

I guess the problem is what we do immediately here, and with a suggested grandfathering in.

May I say this, and I am puzzled, and perhaps the staff has an answer, and perhaps others have, agreeing that I differed with this interpretation given by some that the SSI hearings were not under the APA. I thought they should be, and I thought regular APA judges should [illegible] those cases. You must remember that a part of this backlog, [illegible] staff properly pointed out, that part of this problem is certainly exacerbated by the fact that they had this 1- to 16-month argument between the Civil Service Commission and the Bureau over the appointment process. As a consequence, Mr. Chairman, we were not tooling up, getting ready to hear these cases.

Regardless of whatever procedure they used in the appointment of hearing examiners by the agency, and regardless of what the qualification may be, someone arrived at the salary level two grades lower than the regular ALJ.

Whether that salary determination was based on the difference in qualifications, or based upon a difference in the complexity of the work, or a combination of both, I do not know, but obviously a determination was made to pay these gentlemen at the GS–13 level, two grades lower than the regular ALJ's appointed under the Civil Service procedure.

So, I am sure that this has been considered, and there must be a rationale or reason for this distinction.

Mr. **Kross**. Mr. Chairman, I would simply say that it was part of the whole erroneous process of the Civil Service Commission in first failing to follow the intent of Congress as expressed by the subcommittee——

Mr. **Burke**. Will you speak up? The reporter can't hear you.

Mr. **Kross**. It was an erroneous process of the Civil Service Commission as documented by the staff reports of this committee, that failed to look at the law as passed by the Congress and failed to recognize what we now know is the fact; that is, that on 90 percent of SSI cases, they are disability cases, exactly the same issues as title II.

So, I suggest, Mr. Chairman, that either the Civil Service Commission was wrong in making ALJ's GS–15's, or wrong in making SSI examiners GS–13's. I think the latter was the case, because we are doing the same work, and should all have the same grade level.

Mr. **Burke**. Well, this committee has to come up with some answers, and we will get the head of Civil Service up here. He was unable to show up at the last hearing. We hope to have him up at the next hearing, with Mr. Cardwell. We will sit them down together and see if we can't solve the bureaucratic problem that has been created.

Mr. **Fauver**. Mr. Chairman, I am not an expert by any means on how the Civil Service Commission determines qualifications. I have sat on several of the panels.

But I do believe inquiries by this subcommittee to Mr. Matthews and Mr. Dullea will establish that the qualifications for the SSI examiners and the ALJ's are substantially different.

First, the Civil Service Commission uses a rather detailed chart. I think it is scheduled from A through E as to the level of responsibility that an applicant's legal professional experience should place him.

So, it is not a question of what is the difference between 4 years and 7 years. You could have 40 years, and if it is at a low level of responsibility, it would not qualify you for an APA position.

So, I suggest first, Mr. Chairman, that we—Mr. Matthews attempted to approximate announcing 318, simply dealing with a position two grades lower than the minimum grade of an APA position, he did not have to get to the letters of A through E, which are the higher levels of responsibility that Civil Service uses.

There may be a difference whether someone was assistant counsel, or whether he was himself responsible for the litigation. There may be a difference in the kind of cases that were litigated, or the courts in which they were litigated. I urge this subcommittee, before concluding, that it is just a matter of years—I suggest that it is not just a matter of years. It is a question of level of responsibility reflected in the background of the applicant.

Second, Mr. Chairman, I think there is quite a difference between the two methods of examination with respect to determining judicial capacity because this ALJ position is what you might think of as a life tenure position. That is, it is an absolute and unconditional appointment with the Federal Government.

Because of that, many years ago, the Civil Service Commission arranged with the American Bar Association that it would give the ABA one-third vote on the oral interview panel and the panel that grades the written examinations. The purpose of giving the ABA a one-third vote was twofold. First, it was felt that valuable experience had been shown through the coordination of the ABA and the Justice Department in considering nominations for article III judges.

Second, it was felt by the APA that the system prior to this arrangement tended to favor Government attorneys over private practitioners and the private practitioners through the ABA should be able to show what was their understanding of what would make a good judge.

We feel, Mr. Chairman, and this is not an internecine fight between organizations. I wouldn't be here if it were. We are all interested in the best qualified judges to come through a competitive process. We feel the Civil Service Commission has had three decades of experience on this. In the first place, the black lung judges did not go through a system, as we understand it, that attempted to approximate 318. In the second place, as far as the SSI was concerned, as I have indicated, they were going for a level of responsibility that stood very low. I would urge the committee to consider further inquiries of Mr. Matthews and Mr. Dullea.

Mr. Burke. Would you like to comment on that, Mr. Kross?

Mr. Kross. Yes, sir.

Mr. Chairman, the level of experience and requirements are the same. The vouchered inquiries, which are the basis of determining level and quality of professional experience as opposed to quantity was an identical copy of the voucher used that went to lawyers and judges used for the ALJ inquiry.

The panels that involved oral interviews of SSI applicants all involved a representative of the ABA section of administrative law who had a one-third vote in determining whether we were qualified to be SSI applicants.

And, Mr. Chairman, I don't want to get involved in quibbling over levels of experience, 4 years as against seven. I submit again that there is overwhelming consideration here that makes this unique from any other instance that we have had in Government or have today, and that is, Mr. Chairman, that all the qualifying experience in related fields of private practice in the world are not as important as the level of qualifying experience that come from holding hearings within the system that are identical and on legal issues that are the same, and writing decisions and performing as the ALJ does, and, Mr. Chairman, I suggest that the Commissioner of the Social Security Administration and the Director of the Bureau of Appeals in effect say to the Congress that, "We have a corps of people whom we know from watching them doing the work are qualified and we want to use them to handle title II cases," that, I think, answers the question.

Mr. Burke. This committee is faced with a real problem, and we are not concerned solely with helping the law judges or the hearing examiners with their nitty gritty problems.

What we are faced with is reality, and we are facing the people of our district. Mr. Watson understands, and when we go around and we hear these people that have applications in for disability and are running into delays of 15 and 18 months—some of these are real basket cases. We have to act.

So, I am hoping that the head of the Civil Service and Mr. Cardwell will get to the table together. We want to have a high quality of decisions, but we also don't want to make people wait 18 months or 2 years for their case to be acted upon—they should not have to wait that long.

I can appreciate what you are saying, and what Mr. Watson is saying, but we are confronted with a real problem here, and we are dealing with people. I am not a lawyer, but I think the trouble with attorneys sometimes is that they get bogged down in their own confusion, and sometimes you need a layman in there to kind of straighten things out, and we are going to have some laymen who are going to have something to say about this.

Mr. Fauver. Mr. Chairman, if I may address the question of backlog, this backlog issue makes me think of a fellow in his dining room, and he sees the plaster coming down, because one of the children left the tap on in the bathtub. He runs upstairs with a mop. Instead, he is supposed to go upstairs and turn off the water and take a good look at what is happening to the house.

First, I would like to say, Mr. Chairman, that if the Social Security Administration is not going to follow recommendations that studies really indicate are viable recommendations, the committee will really have to consider whether legislative action is necessary.

If I may, I would like to introduce into the record recommendations that the Federal Administrative Law Judges Conference made back in 1973.

If I may just introduce these, Mr. Chairman, these are the recommendations of the Federal Administrative Law Judges Conference to the Civil Service Utilization Study on Administrative Law Judges, and at pages 34 and 35, we made our recommendations then, and they concluded that the administrative law judge should be given remand authority, because the judges cannot do the investigation work of 10,000 State employees. We really recommended that.

We recommended face-to-face conferences at the State level.

[The recommendations referred to follow:]

IV. SOCIAL SECURITY ADMINISTRATION HEARINGS AND APPEALS PROCEDURES

On July 11, 1973, Judge Frank B. Borowiec, President of the Association of Administrative Law Judges in the Department of Health, Education, and Welfare, presented a statement to the Civil Service Commission Study Group on Utilization of Administrative Law Judges. After careful review of this important statement, and deliberations on further ways to improve the utilization of APA judges in Social Security proceedings, we recommend the following changes in SSA hearings and appeals procedures:

1. The administrative law judge should be given the authority, by statute or regulation, to remand cases to the appropriate Bureau or other office, at his discretion, when he determines that:
   (A) the case file reflects an inadequate and incomplete development of the case, or
   (B) there is significant new evidence not previously considered.
The order of remand should specify the development, with or without further consideration, required by the judge.
2. The Social Security Administration should reinstate the SARIS program with provision for face-to-face conference with the claimant at the Reconsideration Stage.
3. Social Security proceedings which are required by law to be conducted before judges appointed and qualified pursuant to section 3105, Title 5, United States Code, should be adversary type proceedings.
4. Standards for agency review should be adopted to conform to those recommended for all agencies in Part II, above.
5. Publication, in permanent, publicly available form, of all decisions of APA judges and any decisions in review thereof.

Mr. **FAUVER.** Mr. Chairman, I have in my briefcase today, and I imagine our staff has them, the form letters that these claimants get, and as you know, the claimant goes to the district office, he has the briefest of interviews, and when he leaves, that file goes down to a State office.

The decisionmakers come to a decision, and enter a decision in the file, but the claimant doesn't get the decision. He gets a form letter.

He doesn't know why he doesn't qualify.

Then it goes to reconsideration. The decisionmakers don't see the claimant. It is no wonder that we have an army of litigants heading toward Arlington.

From what I see of the hearings thus far, we may be proceeding on the basis of a false dichotomy here, and that is, efficiency versus justice, and I don't think that you have to sacrifice justice for efficiency.

I have undertaken to interview a number of administrative law judges in the HEW Association, and I would just like to summarize it. It won't take long. Proposals that they have made that have never been undertaken by the Social Security Administration which we feel would cut the backlog down, and you won't have to hire one more judge. This is the basis of years of experience. They say they should have authority to make oral decisions in granting allowances.

Under the present system, Mr. Chairman, the Appeals Council does not review allowances, and the judge, nonetheless, has to render a written decision giving conclusions and determinations.

The judges offer their suggestions to me. The ones I have talked to ask, "Why can't we dictate our decision on the record, and then just give a printed form, send it to Baltimore, and put the claimant right on the pension payment right then?"

They say it will cut in half the time they spend in all the allowances cases.

They also ask for remand authority.

Now, there has been a misnomer in these hearings, Mr. Chairman. I believe that Mr. Cardwell referred to the experiment with an informal remand system. My inquiry of the judges indicates that they use, but actually the system at Social Security rather than an informal remand, is an automatic recall right.

The difference would be this, Mr. Chairman. If at the reconsideration level the employee is denied the claim for disability allowance, under this informal remand system, all it means is the agency can keep the case from going to the judge. That is, it can recall the file back to redevelop evidence. That is a long shot, I submit, from remand.

Remand would mean if a judge finds a case file is inadequate, it has not been properly developed, he will send it back and direct they do the proper job.

This is the way it works with the Federal courts when they remand to a Federal agency.

I would suggest that the experiment now being undertaken by SSA, that what they call an informal remand is a misnomer, that, in fact, there is no remand authority in these judges.

Going next to the question of the face-to-face conference, I think there is an error, Mr. Chairman, in the record of this subcommittee. If I can touch on that, I am not going to get into the details, other than to suggest that the SARIS experience of face-to-face conferences with these claimants actually shows a 25-percent reduction in requests for hearings. The administration, I think, has misconstrued the statistics, and they felt there was no practical differences in requests for hearings, so why bother with it.

We suggest that the average American will follow what he can understand. The present system, Mr. Chairman, is that these 107,000 people who are now trying to get a hearing have never been told why they were not disabled, and we think opening the communications between Government and the taxpayer is one of the core problems of this case.

Another area is that under H.R. 8018, for example, the State agencies would be required not only to have a face-to-face conference with the claimant, he never knows who shot John, or whatever.

The Government should give him a decision stating the relevant facts and the reasons for the decision.

Also, we understand from the HEW judges that they don't need more judges over there. What they need is staff. There are many references, Mr. Chairman, in this record to the great variation in the production of these ALJ's, but those production figures, the ones that I have seen, never showed the unit members' production rate, and that is, Mr. Chairman, some of these judges have a higher unit than others. If a man has five assistants, certainly he will turn out more decisions than someone who just has two.

The judges over there tell me if they can work on the two-team system rather than the one team, presently most of them would have a hearing assistant and a secretary. They tell me that if they had two units, that is, one hearing assistant and a secretary, and another unit of hearing assistant and secretary, they could double the production.

These are some of the ideas that would cut back the backload, without hiring one more judge. If you didn't have to hire one more judge, you wouldn't have to get to whether 8911 would be passed or not.

Mr. **Burke**. We will take your suggestions up and look them over carefully. The staff will look them over.

Our next witness is Ernest P. Davis, Jr., chairman, Benefit Review Board, Policemen's Benevolent Association, Yardville, N.J.

STATEMENT OF ERNEST P. DAVIS, JR., CHAIRMAN, BENEFIT REVIEW BOARD, POLICEMEN'S BENEVOLENT ASSOCIATION, YARDVILLE, N.J.

Mr. **Davis**. We, the claimants thank you for the opportunity to present our side of a most serious matter. Wage and contract negotiations are going on throughout the country, as you know. We feel that it is our job as negotiators to obtain the best benefits possible for our members. We also feel that it is our duty to go about this in a way that is characteristic only of our American way—open forum—public testimony at public hearings, for this opportunity, again we thank you.

For the record, my name is Ernest P. Davis, Jr., chairman, Benefits Review Board, Policemen's Benevolent Association, Local 105, Yardville, N.J. (See attachment I.)

The major points of the Administrative Procedure Act (APA) were to satisfy the political will for reform, to improve and strengthen the administrative process and to preserve the basic limits upon judicial review of administrative action. The American Bar Association fought for the proposition that "the decisions of controversies must be brought back into the judicial system." Nonetheless, the APA was passed (1946). However, review continued.

CONTROVERSIES

1949: The report of the Task Force on Regulatory Commissions of the first Hoover Commission led to recommendations, but no drastic changes in adjudication, rulemaking, or related activities.

1955: The report of the President's Conference on Administrative Procedure, which had been appointed in 1953 to inquire into the narrow subject of "unnecessary delay, expense and volume of records in some adjudication and rulemaking proceedings" was said to be noncontroversial, but mild and helpful.

1955: The report of the second Hoover Commission task force was of the view of consistent distrust of the agencies; many of the recommendations were extreme and some of them, admittedly, seemed ill considered. Yet the Hoover Commission refused to adopt the sweeping recommendations of the task force. Only three of its members gave unqualified support to the recommendations to amend the APA.

1957: At least 32 States had adopted a model administrative procedure act.

The point being made that from the time of enactment, 1946, to a followup period, 1957, controversy had surrounded the APA. Reaction had been swift and sure from sides both pro and con. The APA has for the most part survived intact, since enactment, because, in my opinion, recognition of judicial review and administrative procedures are essential to our society.

There is controversy and reaction today in these hearings by both sides of the appeals question. However, we must not lose sight of an accepted foundation of each sides' argument—that of the recognition of unnecessary delay, expense and volume of records in some adjudicatory and rulemaking proceedings. The disagreement being as to the person or persons causing the delay and to whom and where the blame therein lies.

SCOPE OF THE APPEAL

We appeal to you, that the Social Security Administration through the APA discourages claimants and thwarts inquiries.

CASE IN POINT

Our case began with a telephone call by me to a State of New Jersey pension official, see attachment II, protesting the payment of the FICA tax. This resulted in his denial of a formal written appeal, see attachment III.

A review of attachment III and the laws cited prompted claimants to review the APA, section 218 of the Social Security Act, and New Jersey Statutes Annotated, 43:22-1 and the following * * *

An appointment with the local social security office was then arranged. Thereupon, the oral argument was presented, but not in the manner prescribed by APA, section 7, (c)—evidence at hearings. This section in part says that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence as may be required for a full and true disclosure of the facts.

Representatives of the State of New Jersey never showed up at the hearing. We could and tried to show:

New Jersey Statutes Annotated, 43:21-1 and the following, appeared in conflict with a Federal procedure. Namely, setcion 218(d) (2) of the act, "* * * periodic benefits under such a retirement system at such time will not be impaired as a result of making the agreement. * * *"

Claimants had been members of a pension plan where FICA tax payment was not required; then forced to join another plan where FICA tax payment was required; then permitted to join still another plan where FICA tax payment was required. By joining any of the plans our benefit rights would be impaired.

Section 218(d)(3) of the act requires a certain procedure if social security coverage is to be extended to a group. The previously cited New Jersey statute would appear to be the authority used by the State of New Jersey to circumvent this procedure. No copies of any contract, agreement or referendum of required election were available from either the Attorney General or Pension Division Director's office.

Further, such referendum has a 2-year time limit.

Further, members of approved pension plans such as police and firemen are excluded unless otherwise accepted according to the act, section 218(d)(5)(A).

The local office turned down our case, in spite of not holding a fair and impartial hearing in the manner prescribed by the APA. Instead we were referred to the hearings and appeals board. Whereupon new forms would be required to be filled out, presentation of evidence, then a hearing, all beginning again at the local level. Having already spent a year in getting as far as we did, we could forsee the start of that famous government machine called "passing the buck."

Claimants were presenting what we thought to be clear and distinct violations of Federal law. Some of the questions presented were:

Why the unnecessary time, delay and waste of taxpayers' money in conforming to policies not supported by rules?

This claim could and does affect thousands. Is it the intention of the APA to require the same question for all of them to be resolved individually?

Why couldn't the agency concerned, namely the Social Security Administration, appoint someone in authority to hear our case and give us an answer? Thereafter, court proceedings could begin.

These and other questions were raised. Whereupon a direct appeal was made to Congress through Senator Harrison Williams, (see attachment IV); his answer, (see attachment V) and Representative Frank Thompson, Jr.; his answer (see attachment VI). As you can see, copies of H.R. 3255 and H.R. 3774 were forwarded.

Further, due process is denied claimants by having to wait long periods of time before their rights can be adjudicated. Whether intentional or unintentional is a subject matter for an investigation. This same ground applies to allegations that the present appeals process discourages claimants.

NATIONWIDE APPEAL

There are thousands who would like to appeal their case, but get tired of the endless procedure involved and lack the knowledge of law to file a claim. We recently contacted a nationwide police organization and will make available claim procedure to every law enforcement officer throughout the Nation. We are here, hoping that the presentation of our case will have a sufficient enough impact to prompt action. We hope it will not become a rhetorical exercise where nothing is done.

We realize full well what the effect of filing thousands of appeals will have on the appeals process; the tons of paperwork involved and the wasted man-hours at the public's expense. To do this unnecessarily would be gross negligence. However, procedure with cause would be an act dictated by our conscience.

We recommend that this subcommittee forward legislation for the abolishment of the present appeals process as applied to the Social Security Administration per the APA.

There are pension rights involved, but the Social Security Act was not established to relieve the States of their responsibilities to provide fair and equal pension plans to its employees.

Continued enforcement of the APA, as applied, in our opinion helps relieve States of said responsibility.

Further, the individual taxpayer should have a voice when he can offer all concerned a chance to save millions of dollars by paying his own pension plans.

[Attachments to the prepared statement follow:]

Attachment I

POLICEMEN'S BENEVOLENT ASSOCIATION,
LAW ENFORCEMENT OFFICERS LOCAL NO. 105,
New Jersey, September 15, 1975.

Re: Public Hearings, Subcommittee on Social Security, Appeals Process.

Mr. JOHN M. MARTIN, Jr.,
Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, Washington, D.C.

DEAR SIR: As per your notice of August 23, 1975, the undersigned hereby applies to speak at the public hearings.

Policemen's Benevolent Association business requires our presence in Washington on the 24th and 25th of September. As previously indicated to your office, a hearing on the 26th of September would be most convenient.

1. Name: Ernest P. Davis, Jr., chairman, benefits review board, Policemen's Benevolent Association, Local #105, P.O. Box 1, Yardville, New Jersey 08620.
2. Associations: Policemen's Benevolent Association, Local #105, P.O. Box 1, Yardville, New Jersey 08620; Total membership 1406, Policemen's Benevolent Associations locals throughout New Jersey total membership per petitions—7,200.
3. Capacity: Witness will speak ex officio on his appeals case and he will speak for members of his and other locals who are appealing FICA tax.
4. Summary: Social Security Administration uses the present appeals process to discourage claimants and thwart inquiries. The scope of summary is the payment of an authorized pension in addition to being subject to the FICA tax.

Due process is denied claimants by having to wait long periods of time before their rights can be adjudicated. In addition, delay whether intentional or unintentional relieves States, as employers, from the responsibility to provide fair and equal pension plans to its employees; specifically, police and firemen of New Jersey.

Throughout the nation there are law enforcement officers whose numbers run into the thousands who are affected the same way as claimants. As a result, Federal legislation (HR 3255) has been introduced to help eradicate a problem that should be cleared up by the Social Security Administration in a quick, fair, and impartial manner.

Furthermore, a review of cases and how *Kelley* vs *Goldberg* affects these claimants will be discussed. Claimants will recommend abolition of present appeals process as applied to Social Security Administration per Administrative Procedure Act.

Thanking you in advance I am
Respectively,

ERNEST P. DAVIS, Jr.,
Chairman, Benefits Review Board.

Attachment II

TRENTON, N.J., *September 27, 1974.*

J. MCGARRITY,
Acting Director,
Division of Pensions,
Trenton, N.J.

DEAR SIR: As per our phone conversation on 9/26/74, be now advised of a formal written appeal by the undersigned in regard to this Police and Fireman's Pension Fund member being subjected to F.I.C.A. tax payment.

Further, the undersigned does acknowledge your co-operation and courteous explanations in this matter; nonetheless, the Federal or State laws that are applicable are requested. I am,

Very truly yours,

ERNEST P. DAVIS Jr.,
Senior Correction Officer, State of New Jersey.

NOTE.—A review of this matter will be presented to counsel for separate evaluation.

Attachment III

Department of The Treasury,
Division of Pensions,
Trenton, N.J., October 10, 1974.

Mr. Ernest P. Davis, Jr.,
Trenton, N.J.

Dear Mr. Davis: In reply to your letter of September 27th, and supplementing our protracted telephone conversation in which I informed you that as a Senior Correction Officer with, as I recall, the Yardville Correction Center, you are now and must continue to be covered by social security in addition to membership in the Police and Firemen's Retirement System because the title of Correction Officer was initially covered by social security early in 1955 before any State correction officer was eligible for membership in the Police and Firemen's Retirement System.

Under Section 218 of the Federal Social Security Act social security coverage may be extended to employees of a State or any of its instrumentalities at the option of the particular state. Enabling legislation was enacted in New Jersey in the early 1950's and the New Jersey enabling statute may be found in New Jersey Statutes Annotated, 43:22-1 et. seq. The enabling legislation declares that it shall be the public policy of the State of New Jersey to extend social security coverage to public employees in New Jersey on as broad a basis as is permitted under the Federal Social Security Act. The Division of Pensions has followed the statutory precept and has therefore extended social security coverage to virtually all public employees in the State.

About the only sizeable group of public employees in New Jersey who are not covered by social security are policemen and firemen in municipalities which adopted the Police and Firemen's Retirement System many years ago before social security coverage was available to any public employee in New Jersey. The Federal Social Security Act provides that social security coverage may not be extended to employees who are covered by a retirement system unless the members of such retirement system, by referendum, approve the extension of social security coverage to them and future employees in the same position with the same employing agency; approval of social security is possible only if 50% or more of the eligible member vote in favor of social security coverage. Therefore, as I explained to you on the phone, policemen and firemen in cities like Trenton are not covered by social security because Trenton adopted the Police and Firemen's Retirement System some years before social security coverage was ever extended to any employees of the City of Trenton.

I hope this information will be helpful.

Very truly yours,

John A. McGarrity, *Assistant Director.*

Attachment IV

Trenton, N.J. *March 9, 1975.*

Hon. Harrison Williams,
Chairman, Committee on Labor and Public Welfare,
U.S. Senate, Washington, D.C.

Dear Senator Williams: Please be advised that I am in receipt of a copy of your letter of 1 July 1974 to Essex County Park Lieutenant, James Nixon. (Copy I)

As Chairman of the Benefits Review Board (BRB) of PBA Local 105, I am circulating the attached petition for a review of this matter by the State PBA president. (Copy II)

This member has chaired BRB for the express purpose of exploring the pros and cons of paying the FICA Tax. After much research and interviews with State and Federal officials, the inevitable answer to my inquires is, "you always payed FICA Tax; therefore, payment must continue".

As you are no doubt aware, Section 218 of the Social Security Act provides prerequisites for extension of Social Security coverage. These provisions appear not to have been met by the State of New Jersey, as per the Division of Pensions. Further, no one in the Attorney General's Office seems to know about required referendum or can provide me with a copy of same.

The undersigned has appealed payment of FICA Tax at the state level (Copy III & III A). As suggested by a local Social Security office executive, an appeal

will now be filed with the main Social Security office in Baltimore. Judicial proceedings will then be effected, providing of course the problem is not resolved satisfactorily.

Copies of pertinent correspondence are enclosed, as I would be delighted and honored to pursue this matter further with you and your committee.

Your reply is anticipated, I am,

Very truly yours,

ERNEST P. DAVIS, Jr.,
Chairman, Benefits Review Board, PBA Local 105.

Attachment V

U.S. SENATE,
COMMITTEE ON LABOR AND PUBLIC WELFARE,
Washington, D.C., April 7, 1975.

Mr. ERNEST P. DAVIS, Jr.,
Chairman, Benefits Review Board, PBA Local 105,
Trenton, N.J.

DEAR MR. DAVIS: Thank you for your letter regarding Social Security coverage.

As you may know, the House Ways and Means Committee has jurisdiction over Social Security legislation. This Committee has organized a special Subcommittee on Social Security to review the activities of this vital program. Currently, the Subcommittee is carefully reviewing legislation (H.R. 3255) which was reintroduced from the last Congress (H.R. 4533) designed to allow state or local policemen and firemen to terminate their Social Security coverage without affecting the coverage of other public employee groups. The Subcommittee has requested an evaluation of this approach from the Socal Security Administration and expects to continue its probe into the issue in the next few months.

You may be assured that I shall continue to urge prompt action on this issue and I shall keep your views in mind when this legislation comes before the Senate.

With best wishes,

Sincerely,

HARRISON A. WILLIAMS, Jr.

Attachment VI

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 5, 1975.

Detective FRED VINCENT BRUSCHINI,
Trenton, N.J.

DEAR DETECTIVE BRUSCHINI: I am pleased to forward the enclosed copies of H.R. 3255 and H.R. 3774, dealing with the voluntary termination of Social Security coverage for State and local policemen and firemen, as per your request to my Trenton office.

I hope they will be helpful to you and that you will not hesitate to contact me if I may be of further service.

Kind regards.

Cordially yours,

FRANK THOMPSON, Jr.

Mr. BURKE. Thank you Mr. Davis. That concludes the hearings for today.

The subcommittee will reconvene on October 3.

[Whereupon, at 4:45 p.m. the subcommittee adjourned, to reconvene October 3, 1975.]

DELAYS IN SOCIAL SECURITY APPEALS

FRIDAY, OCTOBER 3, 1975

U.S. House of Representatives,
Subcommittee on Social Security,
Committee on Ways and Means,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 345, Cannon House Office Building, Hon. James A. Burke (chairman of the subcommittee) presiding.

Mr. **Burke**. The subcommittee will come to order.

Today we have a very full schedule and I hope that each of the witnesses will adhere to the time limitations that it has been necessary to impose.

Our witnesses today include Members of the Senate and House, a panel of State directors of disability determination services, and individual witnesses representing organizations interested in the disability determination process.

As discussed at our first hearing on this subject matter, the subcommittee will hold another hearing in order to receive additional testimony from the Social Security Commissioner and the Chairman of the Civil Service Commission. That hearing will be held on Monday, October 20, 1975. It is tentatively set to be held in room 2222 of the Rayburn Building at 2 p.m.

Our first witness is the distinguished Senator from the State of Rhode Island, the Honorable Claiborne Pell.

We welcome you here to the committee.

STATEMENT OF HON. CLAIBORNE PELL, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator **Pell**. Thank you very much, Mr. Chairman, for inviting me here. It is very good to be with my friend and neighbor from the Commonwealth of Massachusetts.

It is no longer a secret that an individual who appeals a social security eligibility determination must endure a prolonged and unconscionable delay. I remember that when I first brought up the matter of these endemic delays to the Social Security Administration, I was greeted with disbelief. I was told that case histories characterized by a year or more of delay were merely so-called horror stories, and were unfair examples of the efficiency of the bureaucracy.

There is no longer any doubt, however, that the social security hearings and appeals process provides the slowest justice in our land. If any one of us today were to appeal a decision on our own eligibility, assuming that we were under the social security system, we would have to stand at the end of a very long line; 107,000 people at least would be in that line ahead of us waiting for a decision on their cases.

Moreover, the reversal rate in appeal cases has now reached 54 percent. In other words, more than one-half of the claimants will eventually receive benefits, but these individuals will have waited 12 to 18 months for badly needed benefits which should have been granted to them in the first place.

We are talking about a poor and helpless segment of the society who do not have any high-priced lawyers for help.

This morning I would like to respond to one point raised by Social Security Commissioner Cardwell during your hearing on September 19, and to pursue one point of my own for your consideration.

Commissioner Cardwell, in his testimony and in response to questions, was critical of the time which is currently allowed for claimants to decide to appeal unfavorable determinations. These waiting periods can total 16 months and are composed of two 6-month periods and two 60-day periods. Commissioner Cardwell spoke in support of reducing these periods to 60 days in the name of efficiency.

Mr. Chairman, I cannot think of a less equitable or less functional solution to this problem. Ironically, the Commissioner pointed to the 16 months as a significant factor in the 54-percent rate of reversal in eligibility determinations.

The Commissioner stated that "In disability cases the claimant's condition worsens with time" and then proposed to compress the time in which the claimant may appeal.

Mr. **Burke**. Excuse me, could I interrupt you? There is a quorum call. We will have to go over to the floor and will be right back.

[A recess was taken.]

Mr. **Burke**. The committee will come to order, Senator Pell, you are still recognized.

Senator **Pell**. Thank you, Mr. Chairman.

To continue, it is my belief that if the goal of our system is to provide equity, and since initial determinations are frequently wrong, we must give some credit to the phrase "Time will tell." I believe that claimants need this time to make up their own mind about whether to appeal.

We must remember that the route of appeal is a difficult and unfamiliar course of action for persons who are not used to laws and courts and proceedings. The extra time may also be needed for their disability, unfortunately, to make itself clearer. The fact that disabilities get worse with time is the strongest argument for the decision periods which the claimant now has, and the strongest argument against condensing it simply to get the bureaucracy off the hook. I would urge the committee, therefore, not to support a compression of the waiting time allowance.

Mr. Chairman, to move on to the broader topic of the problem and its solution, I believe that the situations which have contributed to and which will continue to sustain this backlog of hearings and appeals are now clear: First, the Social Security Administration is plagued by antiquated information storage, processing, and retrieval systems; second, there is an insufficient number of personnel at each functioning level; third, there is an artificial and dysfunctional differentiation of duties between hearing examiners and administrative law judges; fourth, the Social Security Administration initially underestimated, and continues to underestimate, the workload required by the supplemental security income program; and, fifth, the present appeals system artificially separates the claimant from the decisionmaker, prolonging the delay before a realistic assessment of the claimant's problems can be made.

These are basically bureaucratic red tape problems, and they are open to administrative solutions. In the same order as I suggested the problems, these solutions would be: one, modernize data processing; two, hire a proper and realistic number of employees to do the job which has to be done; three, eliminate, perhaps through legislation, the distinction between hearing examiners and administrative law judges and thereby integrate the appeals process; four, make realistic projections of the continuing supplemental security income workload; and five, introduce such administrative procedures as "informal remands" and "face-to-face interviews" at the reconsideration level to resolve as many claims as is possible before the hearing stage.

Finally, Mr. Chairman, we must realize that the Social Security Administration, as is the case with any large bureaucracy, will always have some problems with providing prompt assistance to persons in need. There will always be "horror stories" in isolated cases. I believe that we in Congress should establish a statutory maximum time limit on appeals and require the Social Security Administration to either deliver a prompt decision to a claimant or, as in the case of disability appeals, provide temporary financial assistance in the form of presumptive benefits, to the claimant, if an appeal case extends beyond 110 days.

I have introduced legislation in the Senate, S. 985, the "Social Security Recipients Fairness Act," to establish this administrative due-process requirement, and companion bills, H.R. 5742 and H.R. 5743, have been introduced by my Rhode Island colleague, Edward P. Beard, in the House. These measures presently have 40 Senate cosponsors and 48 House cosponsors, and I urge you to give serious consideration to the legislation and to the principle behind it.

It is my conviction that, as we give the bureaucracy more and more power over our lives, we must require it to perform more efficiently and fairly, and we must give the individual citizen solid protection in those instances in which the bureaucracy fails to do its work in a reasonable period of time.

I would point out that S. 985 accomplishes four specific points. First, it provides swift replacement of lost or delayed checks. After they are 3 days late, they must be replaced within a day.

Second, it requires that appeals for hearings for eligibility for retirement, SSI, and medicare benefits must be conducted within 90 days and appeals for hearing on disability benefits must be conducted within 110 days, after which if the hearings are not finished, presumptive benefits will begin. These benefits would not have to be paid back.

This keeps the pressure on the bureaucracy in order to wrap the matter up within 90 days or 110 days, as the case may be.

Third, it extends the time limits to black lung recipients.

Fourth, if accidental overpayments are found, a recipient's check cannot be reduced by more than 25 percent to repay the Social Security Administration in the future.

These four simple actions would do a great deal to relieve the misery, the heartache, the anguish so many of our older citizens on social security face today. The rough estimate of the cost of this bill is somewhere in the neighborhood of between $10 and $12 million a year.

Mr. **Burke**. Thank you, Senator.

You don't believe the 6-month period on appeal should be cut down?

Senator **Pell**. No. I believe sometimes an older person needs a little time to think out what course he is going to take and also the disability may not become clear; I would propose this proposed measure provides added hardship to the beneficiaries already receiving more than their share of hardships.

Mr. **Burke**. We are trying to get a discussion between the Civil Service Commission and the Social Security Administration concerning how many administrative law judges we need and whether or not the hearing examiners are qualified to hear the total social security disability cases.

What is your opinion? Do you think these hearing examiners are qualified to hear the disability cases?

Senator **Pell**. I think the two categories should be combined and the differentiation should be eliminated for the purposes of these hearings between the examiners and the law judges.

Mr. **Burke**. Do you think we could speed it up if we would appoint more administrative law judges?

Senator **Pell**. Exactly.

Mr. **Burke**. And we could make the hearings more expeditious?

Senator **Pell**. Exactly.

Mr. **Burke**. Mr. Cotter?

Mr. **Cotter**. No questions, Mr. Chairman.

Mr. **Burke**. I wish to thank you, Senator Pell, for your appearance. You have made a fine contribution.

Our next witness is the Honorable B. J. Sisk, the author of H.R. 8018, a principal bill relating to social security.

We welcome you Congressman Sisk.

STATEMENT OF HON. B. F. SISK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. **Sisk**. Mr. Chairman, I wish to express to you and the other members of the subcommittee my appreciation for your consideration of my bill, H.R. 8018, which seeks to improve processing of claims under title II of the Social Security Act at the reconsideration and hearing levels. May I also commend you and your staff for your ongoing investigation into the problems of the disability insurance program.

I have been concerned about the lengthy delays involved in the processing of social security disability claims for quite some time and was prompted to introduce this legislation when earlier this year I learned of the actual numbers of claims backlogged at the Bureau of Hearings and Appeals. A growing number of my constituents were complaining to me of the fact that they had requested hearings on their claims and had waited as much as 6 or 8 months for the hearings to be scheduled. These complaints are still coming.

One of my constitutents, Mr. H., a man terminally ill with cancer, filed his claim for disability benefits in December of 1973 and after having his claim denied at the initial and reconsideration levels, he requested a hearing on July 15, 1974. The claim was not scheduled for a hearing until February 21, 1975, 7 months later, and by the time my constiutent was hospitalized for the final time.

The hearing decision reversed the two earlier denials, approving a period of disability for this man back to October of 1973. Unfortunately, however, the claimant died before benefit payments were made to him, and his poor widow thereafter suffered further frustration after the benefits which were due her late husband were erroneously issued to her in his name; added delay of 4 months occurred before the proper payments were issued to the widow. The family had no other financial resources on which to depend during this time.

While this case may be extreme, and let us certainly hope that it is, I am afraid that I can cite other examples where disabled individuals are enduring unwarranted financial and emotional hardship all because benefits for which they are fully qualified are erroneously denied them and the claim appeals process is unbearably slow.

Another of my constituents, Miss F., had her disability claim twice denied before her doctors' reports were even obtained and reviewed. Her case appears to be a prime example of the many cases that are being denied without adequate review and then appealed. The backlog of cases awaiting hearings, according to many hearing judges with whom I have been in contact and as evidenced in the many complaints I receive from claimants, could be alleviated if claims were properly developed and reviewed at the initial and reconsideration stages of processing.

Miss F., who is going blind from uncontrollable diabetes and who suffers from other diabetes complications, applied for disability benefits in November of 1974 at which time she signed permission slips for Social Security officials to contact her physicians to obtain information about her condition. Her claim was denied in April of this year and she immediately requested reconsideration of the claim. She talked with her doctors and they advised her that they had not been contacted by the Social Security Administration at the time she received the first denial. Miss F.'s claim was denied again after reconsideration in May. Interestingly, at the time she was notified of the second denial, one of her doctors had just submitted his report 2 days before she received the denial notice and the other doctor had not yet submitted his report. In May she requested a hearing on the claim and she has not yet been notified of the hearing date.

In this case, it appears to me, if Social Security personnel were not going to contact the physicians as indicated to the claimant when she signed the consent forms at the Social Security office, then she should have been instructed to submit the medical reports herself. At any rate, the obvious problem here is that this claim was never properly developed prior to the issuance of the initial and reconsideration decisions. My experience in hearing the complaints of my constituents tells me that this happens in many cases.

Another claim brought to my attention by one of my constituents is a claim on which a request for an Appeals Council review was filed in September of 1974. This claim, as of this date, still has not received final approval or disapproval from the Appeals Council. It is my opinion that no claim should remain before any board or council for 1 year with no decision being made.

In contacting officials at the Bureau of Hearings and Appeals in March of this year regarding the delay in processing of this particular claim, I learned that the backlog of claims awaiting hearings at that time was estimated to be 100,000 with another 9,000 claims awaiting review by the Appeals Council. I brought this to the attention of the California Democratic delegation at one of our weekly meetings and in April of this year met with several other members of the delegation—Messrs. Corman, Rees, Stark, and Patterson—and the Director of the Bureau of Hearings and Appeals, Mr. Robert Trachtenberg, to discuss the backlog and obtain Mr. Trachtenberg's views as to what the Bureau would need in order to deal with the problem. The California Democratic delegation directed a letter to the chairman of the Ways and Means Committee asking that hearings on the Social Security claims processing problems be conducted, and we are very pleased that the subcommittee is directing its attention to this issue at this time. Based upon our discussion and the general recommendations which grew out of that meeting, and with added recommendations from various administrative law judges, I introduced H.R. 8018 which seeks to deal with the backlog of title II claims awaiting hearings by improving the prehearing process and review of claims to insure that claims are properly developed, that those which warrant approval receive it earlier in the consideration process, and that when a claim is denied it is made very clear to the claimant on what basis the denial is issued. The changes proposed in H.R. 8018 should cut down the number of claims being appealed to the hearing level and would therefore be of benefit to both the claimants and the Social Security Administration.

BILL SUMMARY

H.R. 8018 would amend section 205(b) of title II of the Social Security Act to require that:

(*a*) the law clearly provide for the claimant's right to reconsideration of an adverse decision on his or her claim;

(*b*) the claimant be allowed 30 days from the date of the notice of the adverse initial decision in which to request reconsideration;

(*c*) the claimant be afforded an informal conference to be held between the claimant and an official participating in the decision on his or her claim;

(*d*) the Social Security Administration must issue a reconsideration determination within 90 days from the date the claimant files a request for reconsideration;

(*e*) in the event of an adverse reconsideration determination, the claimant must be given a written statement of the case setting forth a summary of the evidence reviewed, a citation and discussion of the law and regulations pertaining to such claim, and the reasons for the adverse decision;

(*f*) the claimant be allowed another 30-day period in which to file a formal request for a hearing after an adverse reconsideration; and (*g*) hearings be conducted in accordance with the provisions of the Administrative Procedures Act and administrative law judges be classified as GS–16's.

DISCUSSION

I am aware that the procedural changes proposed in my bill have, for the most part, been under consideration by members of your subcommittee staff and the full Ways and Means Committee staff for quite some time, as indicated in the Ways and Means Committee Staff Report on the Disability Insurance Program of July 1974. I will, therefore, limit my remarks to a general discussion of the merits of H.R. 8018.

(*a*) The bill requires that the law specifically set forth the claimant's right to request reconsideration of an adverse initial decision. The reconsideration procedure, while currently practiced, is not formally written into the law. This provision is simply one of codifying existing practice.

(*b*) The claimant is currently allowed a period of 6 months from the time of the initial adverse decision in which to request reconsideration of the claim. H.R. 8018 would limit that time period to 30 days from the date of notice of initial adverse decision. The 30-day limit should work no hardship on any claimant, as it would seem that any individual who is in fact totally disabled and whose claim has been denied would waste no time in registering his disagreement with the denial and stating his desire for further consideration of the claim. My bill would require only that the claimant file a formal request for reconsideration within the 30-day period. If circumstances are such that a new medical examination is needed for the gathering of additional evidence, the claimant would be allowed time in which to submit such evidence.

(*c*) The bill provides for the scheduling of an informal conference for any claimant who requests reconsideration of an initial denial of his claim. Such conference would be in a Social Security district office or State agency office, although the Secretary may designate another place if good cause is shown. The site shall be within 75 miles of the claimant's home unless special circumstances require that it be a greater distance. As discussed in the Ways and Means Committee Staff Report of July 1974, the State agency reconsideration interview study—SARIS—carried out in 1971 showed that the earlier personal interview process did result in better development of claims proceeding to the hearing level and it showed a:

> Significant increase in the allowances rate for the cases with a personal interview and lower reversal rate on appeal for this type of case. (P. 34, Committee Staff Report.)
>
> In its July 30, 1974 report of the Committee on the Study of the Utilization of Administrative Law Judges, the Civil Service Commission observed that "A large number of SSA ALJ's have reported they receive incomplete files—a claim that appears to be supported by the high rate of reversals by ALJ's of reconsidered decisions and the results of a test program (SARIS). The reversal rate by ALJ's of reconsidered decisions was 28 percent in 1965; by 1973, the reversal rate has reached 46 percent. The remand authority recommended by SSA ALJ's should, in the light of the foregoing, warrant serious consideration. However, programs tested by the SSA in 1971 (SARIS and SARTIS) appear to hold even greater promise in terms of effective utilization of ALJ's than does remand authority." (P. 59, Report.)

(*d*) My bill would require the Social Security Administration to issue a reconsideration determination on a claim within 90 days from the date the claimant files the request for reconsideration. Three months should allow sufficient time for the development and review of any evidence the claimant may wish to submit for consideration or which the Social Security Administration may request developed.

(*e*) H.R. 8018 would require that in cases where the reconsideration determination again results in the denial of a claim, the Social Security Administration shall issue to the claimant a detailed written statement setting forth a summary of the evidence pertinent to the issues under consideration, a citation and discussion of the laws and regulations which apply to the claim, and an explanation of the determination made on the issues and the specific reasons for the determination. Presently, the claimant receives only a form-type letter stating that he or she "does not meet the disability requirements of the law" or that "it was determined that the evidence did not show him [or her] to meet all the requirements of the law." This brief and general statement does nothing to assist the claimant in understanding specifically why his or her claim has been denied and many individuals feeling that the denial has been a cursory or arbitrary one, will further appeal their claim without understanding whether their claim has merit, whether all evidence they submitted was actually considered, or whether medical reports actually stated their condition to be different or less severe than they believe it to be.

(*f*) In addition to placing upon the Social Security Administration this new responsibility to explain a denial to the claimant, H.R. 8018 would place new responsibility upon the claimant who wishes to further appeal his claim. The bill requires that the claimant file a formal hearing request within 30 days after the statement of the case is furnished to him or her. Again, this is a substantial cut from the present 6-month period allowed for claimants to file hearing requests; however the 30-day period should allow sufficient time for the claimant to decide whether he wishes to pursue the claim further. The claimant in filing his or her formal hearing request, would be required, however, to set forth specific allegations of error of fact or law related to specific items in the statement of the case. The claimant's failure to specifically set forth points with which he or she disagrees would be grounds for dismissal of the claim. The claimant would be presumed to be in agreement with any statement of fact contained in the statement of the case with which the claimant does not express disagreement.

(*g*) Finally, H.R. 8018 calls for the codifying of existing practice by formally bringing Social Security administrative law judges under the provisions of the Administrative Procedure Act; the bill would upgrade the civil service classification of such judges from their current grade of GS-15 to that of GS-16. The Civil Service Commission, in its July 30, 1974, Report of the Committee on the Study of the Utilization of Administrative Law Judges, observed that:

> In most agencies the ALJ's are GS-16's, with the CALJ at GS-17 if his office has 10 or more ALJ's. Otherwise he, too, is a GS-16. The conspicuous exception in the grading system is the Social Security Administration, whose 431 ALJ's are GS-15's. (P. 27, Report.)

Many social security administrative law judges are loaned to other departments of HEW and to other Federal agencies where they decide cases which are normally decided by judges graded as GS–16's. Not only does the lower grade of the social security judges often result in morale problems for the judges, but it also creates the problem of social security judges being recruited away by other agencies where they obtain GS–16 positions. In effect, it would appear that other agencies might be profiting from the training efforts and expense of the Social Security Administration which loses its most experienced judges to the higher graded positions when openings are available in the other agencies.

Administrative law judges of the Social Security Administration have the same status as other Federal administrative law judges, hear the same types of cases, and have a tremendous caseload; it is my feeling that their status should be acknowledged through the equalization of their grade and pay level to place them on a par with administrative law judges in other Federal agencies.

It is my hope that the members of the subcommittee will agree that the changes proposed in H.R. 8018 are needed and will recommend these proposals to the full committee. Again, may I express my appreciation and that of my 56 colleagues who have cosponsored this legislation for your attention to our concerns.

Mr. BURKE. Thank you, Congressman Sisk.

We welcome Congressman Pepper from the State of Florida. You may proceed with your testimony.

STATEMENT OF HON. CLAUDE PEPPER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. PEPPER. Thank you very much, Mr. Chairman.

I am grateful for the opportunity to appear before the subcommittee to speak in support of H.R. 8848 of which I am a cosponsor.

We have all read the dismal statistics on the lengthy delays in the appeals process and heard from disheartened individuals who have gone through the protracted process of appealing a determination on their applications for social security disability benefits.

The statistics show and the evidence is clear that there exists a substantial backlog of pending cases at the hearings and appeals level within the Social Security Administration. At the present time, according to the Commissioner of the SSA, there are about 107,000 hearing requests pending before the Bureau of Hearings and Appeals with a median processing time of 7 months for a disability hearing. In my opinion these delays in the appeals process are so serious as to raise due process questions.

H.R. 8848 will, in part, streamline the appeals process and, consequently, help in reducing the backlog of pending cases and the time consumed in the appeals process. Before I briefly sketch the merits of H.R. 8848 and also offer some suggestions to improve the proposed bill, I would like, however, to discuss why the appeals process within SSA, as an essential component of the overall process of getting benefits to those entitled to them, deserves close scrutiny to make it consistent with the due process requirements under our Constitution.

There is significant legal authority that constitutional restraints and procedural safeguards are applicable to the deprivation of many forms of statutory entitlements. The Supreme Court's decision in *Goldberg*

v. *Kelly*, 397 U.S. 254 (1970), holding that due process requires an evidentiary hearing before welfare benefits may be discontinued or suspended, recognized the increasingly important role that statutory entitlements and welfare benefits in particular play in contemporary society:

> It may be realistic today to regard welfare entitlements as more like "property" than a gratuity. Much of the existing wealth in this country takes the form of rights which do not fall within the traditional common-law concepts of property. It has been aptly noted that "society today is built around entitlement * * *. Many of the most important of these entitlements now flow from the government * * *." Id. at 262 n.8.

The Court in *Goldberg* sets forth a general balancing test under which:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," * * * and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Id. at 262–263.

To the welfare recipients in *Goldberg*, the interest in the continued receipt of benefits was enormous, since welfare normally provides the only means by which recipients subsist. The Court noted that: "By hypothesis, a welfare recipient is destitute, without funds or assets," and that, therefore, "to cut off a welfare recipient in the face of * * * 'brutal need' without a prior hearing of some sort is unconscionable unless overwhelming considerations justify it." Id. at 261.

This "brutal need" resulting from the withdrawal of public assistance made procedures to minimize the possibility of erroneous terminations essential. "Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." Id. at 266.

Although *Goldberg* applied to recipients under the federally assisted aid to families with dependent children's program, the Supreme Court during the October term in the *Eldridge* case will determine the applicability of *Goldberg* v. *Kelly* to social security disability cases and conceivably require a hearing before any termination of social security benefits.

In *Goldberg*, the Court recognized that: "Termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate." These same considerations that the *Goldberg* Court deemed so important in requiring the Government to continue making uninterrupted payments until an evidentiary hearing had been held, are equally compelling in the case of disability applicants and should require that the Government provide an appeals process designed to resolve the claims of the applicants with reasonable promptness.

Where the eligibility of a disability applicant is in dispute and subject to the Social Security Administration's appeals process, a failure to make a prompt determination on appeal may be depriving an eligible applicant from what is his or her right under statute—a right closely connected to life itself. That deprival is a violation of due process, which this subcommittee should remedy.

Several proposals of H.R. 8848 are particularly noteworthy. One such proposal, for example, is the requirement of mandatory reconsideration of a case within 90 days of a claimant's filing a request for reconsideration. Statistics show that roughly a third of the reconsidered cases result in an allowance of benefits, and therefore, implementation of this requirement can result in granting benefits to an eligible claimant at an earlier stage in the appeals process.

As part of the reconsideration requirement, there is a provision for an informal conference or face-to-face contact between the claimant and an individual participating in the decisionmaking process. During this meeting, the claimant will be told of the reasons for his or her initial denial. Studies have shown a significant increase in allowance rates for the cases with personal interviews. This informal conference should be strongly encouraged because it also aids the claimant in coming to grips with an otherwise incomprehensible and impersonal system.

Another proposal which will help the claimant and will clarify the issues on appeal is the requirement that a statement of the case be prepared and given to the claimant following an adverse decision at the reconsideration level. The claimant would then have 30 days during which to appeal to the last administrative level—a hearing before a GS-16 administrative law judge.

Although the idea of the statement of the case is excellent, the requirement of section 205(b)(6) of the bill should be reevaluated by the subcommittee. Section 205(b)(6) requires that the request for a hearing before an administrative law judge shall set forth specific allegations of error of fact or law related to specific items in the statement of the case, and failure to do so shall be grounds for dismissal of the appeal. Considering that most administrative law judges are likely to continue the present practice of looking at the case de novo, this provision is unduly harsh to a claimant who is not represented by counsel.

Two additional suggestions that I believe would make the appeals process more efficient and equitable, and which the subcommittee should consider in evaluating H.R. 8848, are: (1) That the initial letter notifying an applicant that benefits have been denied contain a simple explanation of the reasons for the denial, and (2) that the time for appeal following the initial decision denying benefits to be somewhat longer than the 30 days provided in the bill.

Under the bill, as proposed, the claimant would first find out the reasons for his or her denial at the informal conference following his or her filing a request for reconsideration. Using this procedure, the claimant is, in effect, required to appeal without knowing why he was denied benefits. If the Social Security Administration has made an initial decision to deny benefits, a simple checklist-type notification in the letter of denial as to the grounds for denial could not be so burdensome to the Government. Such notification would be informative to the applicant and could enhance the possibilities of a speedy resolution to the dispute.

H.R. 8848 proposes to reduce the claimant's time for appeal at the various levels of administrative appeal from the present 6 months to 30 days. The present 6-month time limit could reasonably be shortened without prejudicing the claimant's rights, and a shorter time period will certainly result in a more timely issuance of benefits to those entitled to them.

My concern, however, is with the 30-day time limit for the initial appeal to the reconsideration level. This time limitation might simply be too strict, especially when the applicant only receives a form letter denying benefits and the letter does not give any reasons for the denial. A time period of 45 or 60 days at this level might be more reasonable. The 30-day time limitation for appeal from a reconsideration decision to a hearing before an administrative law judge is more likely to pursue diligently his or her claim at the higher levels of the appellate process.

In conclusion, I would like to commend the subcommittee for the task it has undertaken in examining the disability insurance program. The work the subcommittee has done points to the urgent reforms needed in the hearings and appeals process. Congress must provide the necessary and appropriate structure for a reasonably prompt and equitable resolution of disputes arising out of disability claims. To do anything less would render the statutory right to disability benefits illusory,

I respectfully urge the subcommittee to favorably consider the suggested changes and act on H.R. 8848.

Mr. Chairman, I want to add one other word, and that is that it just occurred to me that if there is not an ombudsman or a sort of a public defender kind of person available in each social security office to help or to provide assistance to claimants who are contesting denial of their benefits, I would respectfully suggest that your distinguished committee consider a provision to that effect.

Now we know that to a certain extent Internal Revenue makes available assistance to taxpayers to prepare their tax returns. The people who are covered by social security whose claims are denied don't have the money ordinarily to hire a lawyer, and yet they are required to present technical data justifying their continued payment of the claims they have been reporting. Therefore, it would seem to me to be the appropriate thing to establish in every social security office an ombudsman or a public defender-type person knowledgeable in the law to assist the claimant so he or she would not have to spend more money that he doesn't have ordinarily, trying to get a lawyer to protect himself against a decision of a bureaucratic agency, or an agency of the Government made without any consultation with him, depriving him perhaps of the only means of livelihood that he possesses.

And I think that one factor alone would be an enormous conrtibution to the people receiving the social security benefits, if your committee thought wisely of the proposal.

Mr. BURKE. Thank you for a fine statement, Senator.

Mr. Jones.

Mr. JONES. Thank you, Mr. Chairman.

I want to thank Mr. Pepper for another very fine statement. Your leadership in this area is well known, and I want to commend you also.

Let me ask you, Congressman, would you support upgrading these hearing examiners who, I think, are presently GS-14's and immediately moving them to the ALJ status to help get rid of this backlog?

Mr. **Pepper**. Yes, Mr. Jones, I certainly would. I think it would be a very desirable provision to make.

Mr. **Jones**. Thank you very much.

Mr. **Burke**. Mr. Pickle?

Mr. **Pickle**. Thank you, Mr. Chairman.

First, I want Mr. Pepper to know that Mr. Pickle welcomes him to the committee meeting. While you are here, in connection with the question Mr. Jones asked, could I inquire of the Chair if we have had any response from the Civil Service Commission, the SSA, about whether they have been able to work out any accord on the hearing examiners?

Mr. **Burke**. They are going to appear on October 20.

Mr. **Pickle**. Neither has submitted a possible agreement or accord that they think they could work out?

Mr. **Burke**. Not yet.

Mr. **Pickle**. It is good to see you, Congressman.

Mr. **Burke**. I want to commend you, Congressman Pepper, for appearing here this morning. Your work in the social security field is well known throughout the Nation. I am impressed by the very excellent suggestions you have made on providing counsel for these applicants—many of them do make applications and know very little about the rights they are entitled to, and they may be denied favorable decisions as a result of that lack of knowledge of the law.

Thank you very much.

Mr. **Pepper**. I want to commend you and your committee for the fine work you have done in the past and the great contribution you are going to make in the future to help the social security recipients of this country.

Mr. **Burke**. Congressman Heinz is our next witness.

STATEMENT OF HON. H. JOHN HEINZ III, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. **Heinz**. I want to thank you for this opportunity to testify on the subject of the appeals process and social security. My reason for being here is very much like that of Mr. Pepper, who preceded me, because he as chairman and I as ranking minority member of the Aging Subcommittee on Health and Long-Term Care have been very concerned about this subject.

I believe very strongly that immediate action should be taken to alleviate some of the problems encountered by social security recipients in applying for disability benefits or in appealing adverse decisions. In this connection I take issue with Commissioner James B. Cardwell, who has earlier given testimony to this subcommittee which I believe is misdirected. Some of his recommendations would have the net effect of increasing the number of steps or amount of time before releasing a definitive decision in the appeals process, and would further limit the right of appeal of citizens by imposition of hurdles which place an inordinate burden of responsibility on the individual recipient.

Some of the programs and administrative processes which Commissioner Cardwell says are in the experimental stage may have value, but the weight of his testimony is to make one believe that things really are under control if only we place no new burdens on the Social Security

Administration. One might almost believe that it is the Government that operates under handicap in these cases rather than the client.

I do not agree with his assessment of the situation. If we lose sight of the basic entitlement of individuals who have worked to earn their social security benefits, then we have indeed let the welfare mentality color our thinking in an unfortunate and perverse way.

If we can, on the other hand, improve this process by developing procedures which will give individuals the right to speedy and fair review of their case, it will establish an important precedent not only for the social security disability programs, but for other Government programs that attempt to address themselves to the needs of all citizens.

Before I make specific recommendations for changes in the appeals process, let me bring these problems into concrete focus by describing the case of one of my constituents. As of this date, he still has not received a decision on his case: 1 year and 188 days after his case was opened. Whether or not this case is an average one is immaterial to my argument, for it graphically illustrates that responsibilities are being denied every step of the way in the appeals process.

Four years ago a 27-year-old man (whom I shall refer to as Mr. S.), who lives in the center of my district, was admitted to the Mayview State Mental Hospital with the diagnosis of paranoid schizophrenia. When he was committed, his parents applied for and received social security disability payments, $100 of which went to the institution in payment of his maintenance. On March 27, 1974, after a period of remission of his symptoms, he was granted an off-grounds parole. This parole allowed him to go into the community from 7 a.m. to 8 p.m. to seek work, recreation, and normal social contact.

This young man applied for and got a job at a restaurant washing dishes. Since he and his parents had read the social security brochure, they were aware of the requirements that he report his new job to the Social Security office. He did so and they promptly cut off his disability payments. His payments were terminated in August of 1974.

One and one-half weeks after he began working, he was forced to quit the job because he could not stand the stress of doing regular work. In the meantime, the parents received a notice from Social Security that "it has been decided that Mr. S. is able to work and, therefore, not entitled to disability payments." The parents, of course, filed for reconsideration, saying that it was not true that he could work, that he had in the meantime gone to a mental hospital in West Virginia, and that he had been treated there and returned to Mayview Hospital.

They had tried to obtain a statement to support their claim, but the hospital physician refused to write a statement about his competence for fear that Mr. S. might use this as a basis for suit. Note that the test of the law is not competence or incompetence but, rather, that he be deemed unable to perform gainful work.

I am sure that many of you are aware that this same brochure, which requires that a person who had begun work to report to the Social Security office immediately, also stipulates that clients have a 9-month grace or trial period to see if they can work under their disability without any loss of benefits. Before I complete the narrative of this case, let me leave you with a question.

Why is it that the Social Security office so promptly and efficiently discontinued his benefits, and yet was so unmindful of the fact that a specific clause did not remove his entitlement to continued benefits for a 9-month period?

To return to the case, the family appealed the decision on November 1 and filed for reconsideration. The appeal itself and the case records were not sent to Baltimore until February 1975. From November to February they languished in the local office with no one taking action on them.

They finally came to our office and, of course, we inquired whether or not they had made the usual appeals to the Social Security office. They said, "Please don't tell me to go to the Social Security office. We have done this over and over, and we are being totally ignored."

When one of my caseworkers inquired as to the status of the case, no definitive information was available from the local Social Security office. The case was then referred to my Washington office.

I wrote to Commissioner Cardwell on April 8 asking him to look into this case. On May 6 I received a letter from Mr. Cardwell which read in part "We are giving your inquiry attention and will be in touch with you as soon as possible."

I later received a reply from Samuel E. Crouch, the Acting Director of Social Security, which incidentally did not have a date on the letter, but which was received in my office on May 27. The letter in part said, "I am informed that Mr. S.'s records are being reviewed in our Bureau of Disability Insurance (BDI). As soon as this work is completed, I will send you a further report." On July 23 we received a teletype from Samuel Crouch: "This is to advise you that our Bureau of Hearings and Appeals has the case."

Finally, on September 22, after discussions between our staff, our caseworker called the BDI congressional liaison, and asked where the file was and what its status was. The congressional liaison, Mr. M., said the file was in the medical staff section of BDI contrary to what Mr. Crouch had said in his letter. He also said that he was required to request Mr. S.'s file in writing rather than walking over to get it because of the rules and regulations of Social Security. He informed us it would take at least 5 days to get to him. As of September 30, when we last called him, he did not have this file.

On September 29, this past Wednesday, the caseworkers received a call from Ms. P. of the Bureau of Hearings and Appeals in Arlington, Va. Ms. P. said that the records showed that the file of this person was in the Pittsburgh Bureau of Hearings and Appeals awaiting a hearing date and that she knew nothing more.

Our caseworker then called Mr. M. at BDI. She asked, "Where was the file, in Baltimore or in Pittsburgh?" He then proceeded to get a readout from the computer which told him that the file had been moved from the medical staff section to the medical review section in Baltimore on September 25. He knew nothing more.

It so happens that the Bureau of Hearings and Appeals in Pittsburgh is two floors above my office. My caseworker went to the administrative law section to determine if the case was, in fact, there. She was informed that they were in receipt of a request for a hearing, which was initiated on May 21 by the client's father. This request was initiated completely independently of the described process, out of his frustration and anger of the inaction as of that date. Of course, there had been no hearing date assigned because BHA "has his file and hasn't sent it."

As of this date, my constituent has not received his hearing or notification of his hearing date. We do know that depending on whom one speaks to in the social security system, he has the same purported file in three different places, none of which can be produced on request. Note, too, that each person in each agency attempted to be helpful, but also claimed no knowledge or responsibility for action or lack of action in this case.

As I recount this I find myself angry, not only at the miscarriage of justice committed to a person who had no business having his benefits terminated in the first place, but also because the system is so elaborate and so impervious to direct human appeal that responsibility can be placed on no one person's shoulders.

Personally, I think that the Social Security Administration has treated Mr. S. and his parents with the consideration that one would expect of George Orwell's big brother in his novel "1984," and the rationality of the investigator in Kafka's "The Trial." This case would truly make for theater of the absurd.

A postscript: On September 23 a caseworker spoke with the mother of Mr. S. Her son is still in the hospital, but is again undergoing a remission of symptoms. This has been a pattern throughout his illness. The question comes to mind: Will the same process occur again?

To return to my opening comments: I would shift the focus of the reconsideration process and appeals away from such recommendations as suggested by Commissioner Cardwell in his testimony of September 19, which, among other things, would reduce appeal time for hearings from 6 months to 60 days, or which would fully explore ways to determine the residual capacity of disabled persons to work.

With respect to the latter recommendation: In a job-scarce market does it make sense to place the onus of finding a job on an often severely handicapped person rather than to continue benefits that are due him while he determines if he is able to work? Should we reduce appeal time and impose time limitations on clients' access to judicial review when it is apparent that the Social Security Administration often takes as long as 1½ years before it even refers claims, let alone process them to a definitive decision?

I would rather suggest that the reconsideration and appeals process have more avenues open for shortcutting or bypassing some of these bureaucratic procedures. I believe that the claimant should have the option to skip reconsideration and go directly to a hearing. There are few denials that are reconsidered and accepted, in part because more supporting evidence must often be gathered than is in the original file. We know for a fact that claimants rarely are given access to their file or are appraised of procedures by which they may gather more evidence that would be in support of their reconsideration.

I would suggest, too, that time limits be set on each stage of the process. As the above case illustrates, cases can and do languish for years before attention is given to them, and conversely, if there is quick determination, it is almost always a denial. One suggestion in this regard would be to impose an overall time limit on reaching a decision for each case. For example, if a decision was not made in 110 days, a claimant would automatically then begin to receive benefits and would not be liable for a payback penalty if the decision would ultimately be unfavorable to him.

I would also recommend that an amendment be made to the basic form of the law to stipulate a clear determination process of those who do not have disability insurance. At the present time, the 6-month delay in receiving disability payments is predicated on the fact that most people employed full time have some disability insurance as part of their health and welfare benefits.

Mr. BURKE. I will have to interrupt you, Congressman. The second bells have rung, and we just have time to make it. We will recess and return.

[A recess was taken.]

Mr. BURKE. The committee will come to order.

We recognize Congressman Heinz.

Mr. HEINZ. Thank you, Mr. Chairman.

There should be a section of the application which, in effect, states that: "I do not have disability insurance, and so I wish to receive it on determination of my eligibility."

There is also great need to give claimants as well as local Social Security personnel, instructions and education on what the process entails, and what must be done to gain a decision. We need more informed persons at the local level to give total and complete guidance to the applicant.

Mr. Chairman, I can't emphasize this point too strongly, because time after time and in many individual discussions I had with people who work in the three Social Security offices in my district, too often the question is one not so much of the motivation, but of insufficient experience and training and education of the people who work in those departments.

There are no such specialists in the local Social Security office in my district on the frontline at the present line. Many claims, including SSI, are taken by personnel insufficiently briefed on special provisions and efficient disposition of cases. I know of cases where trainees have made final determinations.

There seem to be a persistent infatuation with lengthy forms on the part of SSA. With the hundreds of management consultants and experts in the field available to the Social Security Administration, why can't a process be devised which will reduce the number of forms involved in the appeals process? I don't know whether one should go as far as to suggest that when a client applies for disability, one person should make the determination of the case on the spot on the basis of presented evidence, but I do know that there are profound lags in processing claims to decision at the State, regional, and national levels which must be rectified.

We have reached the point where one of my constituents, a bedridden woman receiving disability, who had her check stolen, rented an ambulance to take her to a notary to sign an affidavit to the effect that she is, in fact, bedridden, and then proceeded on a stretcher to the Social Security office to present this affidavit.

This woman needed quick replacement of her check with consideration for her disability without engaging in this tour de force to gain action.

In summary, this is a problem which begins when the original disability claim is made, and continues to the point where substantial financial penalties are incurred by people who are entitled to benefits, but who do not receive them because of the inadequacies of the system. The solution is not merely more personnel and more appeals judges. It also lies in simplifying the system and allowing many prima facie appeals cases to be decided swiftly without imposition of extensive processing and handling that confuses the processor as well as the client.

Mr. Cardwell says his recommendations are aimed at reducing the backlog of appeals cases. I believe that the result of much of what he suggests would be to deny hundreds of thousands of genuinely eligible needy people social security benefits they have paid for and are entitled to.

I want to thank you, Mr. Chairman, for allowing me time to present this case and my recommendations.

Mr. Burke. Thank you, Congressman Heinz. Are there any questions by members of the committee?

Mr. Pickle?

Mr. Pickle. Thank you, Mr. Chairman.

I take it, Congressman Heinz, that you differ with Commissioner Cardwell in the general approach.

Mr. Heinz. That is correct.

Mr. Pickle. Mr. Jones had asked earlier if we could cut through our bottleneck by upgrading the level of the examiners or lowering the ALJ's, either way. What would be your specific recommendation in that regard?

Mr. Heinz. I have suggested an approach that is quite different from that; namely, that we should try and make people at lower levels in the social security administration process responsible for making earlier and faster determinations, that they should be trained better, that there, in fact, should be people who have training responsibilities in local Social Security offices.

In my district in downtown Pittsburgh, a very large Social Security office, as of today there is not one person so assigned. So my emphasis would be on trying to make earlier and faster decisions, presumably stipulating that an individual who makes those decisions is, in fact, responsible for making those decisions.

I think one of the things that has to be clear from the case of Mr. S. is that no one is in this whole system really accountable for making those determinations and decisions that really count. I think we should try and establish accountability at a local level.

Mr. Pickle. The district and/or State office, or both?

Mr. Heinz. I would like to see it at the district Social Security offices. We pay a reasonable salary to many of those people. I think if they had the proper training, they would be competent to make those decisions.

Mr. Pickle. You may be right. I don't think any of us would quarrel that a better answer might be in improving the personnel at the local level.

The big delay has been at the appeals area. Once it gets into that appeals process, it seems like it stretches out interminably. Perhaps if we had better personnel in the beginning, we could alleviate that.

Mr. **Heinz.** That is the thrust of my sentiment. I think too many things go on to the appeals process that really don't have any need in the first place to go there. I might only add that one of the things that concerns me about a government when it gets into a fiscal bind—as I think we all recognize we are in with a lot of spending and not so much in the way of revenues as we would like to see—is that the first instinct of government seems to be to put on administrative controls as a way of cutting down on government expenditures.

Oftentimes those administrative controls not only are very unfair, but they result in enormous bureaucratic costs. I am sure in the case of Mr. S. that the costs of all the phone calls by my office, by the Social Security offices back and forth, by his calls, is an enormous cost that seems to be in terms of the cost of actually paying off on a case, in terms of the disability payment, it seems at first glance to be worth it to some administrator down here. But in fact, the judgment as a whole may not be, in reality, the cost-benefit ration that it appears to be.

Mr. **Pickle.** Thank you, Mr. Chairman.

Mr. **Burke.** Thank you, Congressman Heinz. We appreciate your presentation of cases which amplified what the problem is.

Mr. **Heinz.** Mr. Chairman, thank you very much for this opportunity to be here.

Mr. **Burke.** Our next witness is Congressman John F. Seiberling of the State of Ohio.

We welcome you, Congressman Seiberling.

STATEMENT OF HON. JOHN F. SEIBERLING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. **Seiberling.** Thank you very much, Mr. Chairman.

I am grateful to have this chance to testify as you examine the inordinate delays in Social Security hearing decisions and as you consider possible solutions to this crisis.

I know it isn't necessary to tell this subcommittee how serious the hearing backlog problem is today. It is surprising that the statistics included in the background material published by the subcommittee for these hearings have not made headlines in newspapers across the country. They reveal a scandalous situation where thousands of deserving individuals are forced to wait years for their social security disability insurance benefits.

Figures show that nationally, one-half of all disability claimants wait more than 224 days from the time they request a hearing until a decision is issued. However, in certain parts of the country delays are much longer.

In the Cleveland hearing office, where my constituents' cases are heard, hearing dates are now being assigned for claimants who requested them over a year ago. Furthermore, even if a favorable hearing decision is issued, in many cases a claimant may wait 2 or 3 months before any benefits are actually paid.

As this subcommittee also knows, the present hearing crisis did not develop overnight. Since I have been in Congress, I have received more complaints about long delays in claim processing in the disability insurance program than about any other Federal program.

I might say that I have the equivalent of one full-time caseworker who does nothing but work on social security cases alone. I am sure many of you have the same backlog.

On numerous occasions over the past 4 years, I have brought my concerns to the attention of Social Security officials, and I have consistently received empty assurances that they were doing everything possible to reduce the backlogs.

As the "Committee Staff Report on the Disability Insurance Program" documents, Social Security has paid little attention in the past to reports and recommendations of the Ways and Means Committee and of the General Accounting Office with respect to improvements in their claim processing operations. An atmosphere of bureaucratic inertia, pervasive in the higher ranks of the Social Security Administration, has prevented any major changes in operations which would improve the situation. I have been dismayed by the lack of any deep concern for the plight of the benefit recipients and claimants shown by social security officials in my contacts with them.

I don't intend to imply criticism of individual officials or administrative judges. Many of them are operating without adequate supporting personnel, and they are operating in a system that itself is a model of inefficiency and archaic procedures.

The victims of this Social Security maladministration are many thousands of disabled workers who may use up all their savings, lose their homes, and end up on welfare while they wait for decisions on their claims.

Clearly, Congress cannot continue to rely on the Social Security Administration's promise that tomorrow will bring reform. It is time for Congress to take action to require the Social Security Administration to live up to the intent of the diability insurance program, which is to provide timely, efficient service.

To achieve this goal, I have introduced the Social Security Rights Act of 1975 which 59 other Members have joined in cosponsoring. The bill places limitations on the amount of time the Social Security Administration can spend in processing social security benefit claims at all levels of the determination and appeals process as follows: Initial claims, 90 days; reconsideration requests, 90 days; hearing requests, 120 days; and appeals council reviews, 120 days.

The act gives claimants the right to request and to receive emergency payments within 10 days, based on their earnings records, if they have not received notification of decisions on their claims within the specified periods of time. It also establishes emergency payment procedures for recipients whose monthly benefit checks are missing and for claimants whose monthly benefits are late in starting.

Time limits on the processing of Government benefit claims is not a new concept. It has worked well under the food stamp program where applications for benefits must be reviewed and decided in 30 days and in the aid to dependent children program where the limit is 45 days. If we can justify time limits for these programs, how can we not provide the needy social security claimant with similiar rights?

Census Bureau records show that approximately 25 percent of families with incomes below the poverty level are social security recipients. Most claimants have contributed regularly with every paycheck to their social insurance and they deserve to have their cases considered promptly.

The establishment of the extensive new programs of black lung benefits and supplemental security income (SSI) imposed heavy burdens on the Bureau of Disability Insurance and the Bureau of Hearings and Appeals and caused disruptions in the normal operations of the processing of benefit claims and payments. Passage of the Social Security Rights Act or similar legislation would prevent such processing dislocations in the future in the event that these agencies are given the responsibility of administering a national health insurance or other new program.

In addition, the bill would extend emergency payments rights to recipients of retirement and survivors insurance. Certainly, claimants under all social security programs deserve to have their payment problems and claims resolved in a timely manner.

Understandably, the Social Security Administration, like all Government agencies, has been under heavy pressure to cut costs. Unfortunately, this has happened at the expense of their program beneficiaries. For example, in early 1973, a decision was made to reduce the number of employees to be hired to administer the new SSI program from 19,000 to 12,000. As a result. many personnel had to be diverted from the Bureau of Disability Insurance to help implement the SSI program, and the processing times for disability claims grew longer.

By improving processing operations to enable decisions on claims to be issued within the periods specified under the act, unnecessary payments to ineligible claimants would not be made. Money could also be saved by insuring that as many claims as possible are properly determined at each level so that only the most difficult borderline cases would end up going through the expensive hearing procedures. Legislation requiring faster claim processing will eventually save taxpayers money. Perhaps the committee can come up with proposals to write into law provisions to protect against people who drag their feet in supplying information where the delay is the fault of the claimants.

Mr. Chairman, on September 19 Commissioner Cardwell outlined the measures the Social Security Administration is taking to solve the hearing crisis. These measures include increasing administrative law judge productivity and reducing a number of cases which reach the hearing level. The hiring of more administrative law judges has also been discussed. I support these measures.

However, in his remarks before this subcommittee on September 19, Mr. Robert Trachtenberg, Director of the Bureau of Hearings and Appeals, projected that even with the implementation of these measures the current backlog of 107,000 hearing cases can only be reduced to some 80,000 cases by June, 1976.

Mr. Chairman, I agree with you that the severity of the situation calls for more extreme and immediate steps to reduce the backlog to an acceptable level at the earliest possible date. I believe that the enactment of the Social Security Rights Act or similar legislation would bring about the kind of changes needed to reduce the backlog substantially.

I might say that I have read the statement of Mr. Ralph Abascal, deputy director of California rural legal assistance, given to this committee last week, where he commented upon my bill and suggested some possible changes and additions, and I subscribe to his comments. I think they were excellent suggestions. I would be happy to answer any questions I can.

Mr. BURKE. Are there any questions?

Mr. Pickle?

Mr. PICKLE. I am intrigued with the cutdown on time to a time certain. Would this be in violation of due process, would the individual rights be protected if this became law?

Mr. SEIBERLING. I don't think it would unless the individual was in some way deprived by this deadline of his right to present his case. I am advised by people who are experienced in trials that they feel that this amount of time is adequate as far as their part of the job is concerned, the administrative law judges.

I think that there is no real reason why in 120 days, for example, a claimant couldn't collect whatever material is necessary.

It might be desirable to provide some escape clause in the law that the time could be extended at the request of the individual claimant if he could show good cause. But I don't think there is any other way that he could be denied due process.

Mr. PICKLE. Suppose you say the case must be enacted on in 90 days or 120 days unless the administration in writing notified the claimant that a decision could not be reached for the following reasons, one, two, three. Would that be a safeguard?

Mr. SEIBERLING. I would be concerned, Mr. Pickle, that that kind of way out would be an invitation to the officials to delay and would be used to circumvent these time limits.

I think we must have the pressures on the Administration to come up with decisions within these time frames and possibly in shorter time frames. But where the claimant shows that he cannot provide the documentation in time, I think he should be allowed to get an extension. In such case the right to get a substitute check, because the decision has not been reached, as my bill would provide, would have to be extended to a later date.

Obviously if the delay was at his request he should not profit by his own delay.

Mr. PICKLE. Thank you.

Mr. BURKE. In the Administration's testimony it was indicated that the appointment of additional administrative law judges in addition to other changes that they were contemplating might reduce the caseload by an average of about 1,000 cases a month. Now, with the present backlog of 107,000 cases that would mean that it would take about 6 years to get down to a reasonable number of cases.

Don't you believe that is too long a time to wait?

Mr. SEIBERLING. I certainly do, Mr. Chairman. I think that if necessary they should go on a crash program to clean up this backlog. I see no other way out of it.

Mr. BURKE. In the testimony by Congressman Heinz it was indicated that a part of the slowdown may have been the result of imposing administrative controls as a way of reducing expenditures in order to counteract revenue reductions. Do you believe that a slowdown was justified by any bureau of the Government for those reasons?

Mr. SEIBERLING. I certainly do not, no, sir.

Mr. BURKE. The committee wishes to thank you for your appearance here today.

Mr. SEIBERLING. I thank you.

Mr. BURKE. Our next witness is the Honorable Congressman Edward Beard, State of Rhode Island. Congressman Beard has been very active in the social security area. He has been constantly in touch with me, pointing out many of the problems that the people talking to him have had.

Mr. Beard, you may proceed with your testimony.

STATEMENT OF HON. EDWARD P. BEARD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

Mr. BEARD. Thank you very much. In joining my colleague, Senator Pell, today in discussing the Social Security Act, there are approximately 22 million elderly Americans in this country. Like my mother, they depend on social security checks to come in at the first of the month, and sometimes if the check is lost or in some cases stolen, this may mean weeks of delay. When they have to pay their rent and pay their bills that have to be met it is very, very difficult.

Basically, this Social Security Fairness Act and the bill Senator Pell introduced into the U.S. Senate would cut down the bureaucracy and the time that an elderly person would have to wait in order to receive their check. Can you imagine what would happen in this Congress if our checks, our own checks came in late? Let's say if we were expecting the checks at the end of the month and all of a sudden there is a delay of 2 or 3 weeks, that telephone would be ringing to every agency in the Government that has jurisdiction over our pay. When we realize the hardship and how tough it is for an elderly person to live on a social security income, it is extremely difficult when the check is late, it is extremely difficult when it is stolen and they have to wait weeks in order to obtain that check. I think this legislation is the answer and I certainly would hope that the committee would give favorable consideration and really move and get this bill over to the Senate where I know Senator Pell will go all out to see it passed in the Senate.

Mr. COTTER [presiding]. Have you completed your testimony, Mr. Beard?

Mr. BEARD. Yes, sir.

Mr. COTTER. Thank you very much.

Just 1 minute, the chairman is returning.

Mr. BURKE. Your bill is related to lost or stolen social security checks?

Mr. BEARD. This is a constant problem. My mother was a recipient of this basic problem, having her check lost and she had to wait weeks. There were weeks gone by before the check was issued. Believe me it is an extreme hardship on our elderly people when they have to wait. The fellow collecting the rent and the grocery bills are due, and some of these old people have to go to welfare to get some kind of help or some charitable organization. I can't urge strongly enough that I really would hope this committee will move as fast as possible, and with Senator Pell pushing this bill, it would be good for Americans, certainly good for our elderly residents.

Mr. **Burke**. Thank you. We appreciate your appearance here today and I know you keep the pressure on me all the time. The State of Rhode Island is fortunate to have a young man like you in there carrying on the battle.

Mr. **Beard**. Let me say this for the record, I have had arguments with politicians, particularly at home, but I have the highest respect for the chairman of this committee because he has proven himself to be a champion of the people, and the State of Massachusetts is very lucky.

Mr. **Burke**. Our next witness is the Honorable Dave Evans of Indiana. You may proceed, Congressman Evans.

STATEMENT OF HON. DAVID W. EVANS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. **Evans**. Mr. Chairman, thank you for the opportunity to come before this Subcommittee on Social Security and the chance to enter testimony regarding social security and our Nation.

The sharp increase in social security complaints reaching my office causes me great concern for the procedures involved in solving those problems. This case load requires two persons in my office to handle social security complaints on a daily basis.

The appeal process is causing the major problems according to constituents. An appeal on a local hearing level can take as long as a year for just the appointment of a hearing date alone.

I do not wish to indicate that the Social Security Administration should answer my congressional problems more promptly, or that I should expect special treatment. What I do wish to state is that the problems should be acted on more quickly. All in all we are working for the people and act merely for and on their behalf.

The Social Security Administration has trouble with their computer when a person, who is previously receiving disability benefits, turns 65 years of age, and is transferred to retirement benefits. There is often a delay in the arrival of his checks.

After an individual is awarded his disability benefits, there next occurs a delay before they receive their checks on time. This delay is often 3 to 4 months.

Currently, children are dropped from social security on their 18th birthday. If the 18th birthday falls during the school year, and before graduation, there seems to be no problem. When the 18th birthday falls after graduation or the child is already 18 and then graduates, the benefits are dropped regardless of whether or not the child will continue his or her education. It takes 5 to 8 months for the child to begin receiving his or her benefits again.

Presently, the mother collects as long as a child is considered a dependent—under 18 years or over 18, if the child is continuing his or her education. However, if the child is dropped because of a mixup regarding his 18th birthday, the mother does not receive her monthly checks until the problem is solved and the child begins collecting monthly checks again. This, too, hurts the child who desires to continue his education, and has no support check for that education.

Service might improve if social security complaints from constituents in my district could be directed to the local office where the person's file is usually kept, instead of sending them to Woodlawn, Md., thus causing a further time lag.

It is my opinion that efficiency standards for social security need current and continuing review. That is not to say that the Social Security Administration necessarily should be enlarged and more personnel employed.

To simply complain about the Social Security Administration service is not the answer. The quality of our decisions following these hearings and subsequent laws amending the present system must be forthcoming. I would like to be a part of a solution to this increasing problem.

Mr. **Burke.** Thank you, Congressman Evans. Our next witness is the distinguished Member of Congress from the State of West Virginia, Congressman Ken Hechler. We welcome you, Congressman Hechler, and you may proceed with your testimony.

STATEMENT OF HON. KEN HECHLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. **Hechler.** Thank you, Mr. Chairman. In the spirit of the occasion, I would like to add my commendation to you and all the members of this subcommittee for holding these hearings and for taking the leadership on this legislation.

I would like to submit my statement for the record and proceed informally.

Mr. **Burke.** You may summarize if you wish and your entire statement will appear in the record, without objection.

Mr. **Hechler.** You were asking about the number of letters that were received by another Member that testified. I would say that there are approximately 5,000 cases pending in my office which relate to black lung and disability appeals. This is a rather large number. In addition to that, one of the previous Congressmen who testified indicated that he had one person working full time. I have three people working full time and two part time on these appeals. The main problem appears to be the long delay and the large backlog.

I was interested in the suggestion that our colleague, Mr. Pepper, made about setting up an ombudsman within the social security local offices. I am not entirely sure that this would solve the problem, because we as taxpayers pay our taxes expecting all the officials to protect the public interest and to move these cases with the utmost speed. I am disturbed, however, by the necessity that many black lung claimants and those who have appeals that are filed feel the necessity of relying on lawyers in order to process their claims, particularly if they appear before administrative law judges. It just seems to me that there must be a better attitude, from top to bottom, on the part of those officials that we pay our taxes to support, to try to assist the claimants in assembling the necessary evidence, medical and otherwise, so it won't be necessary for many of these claimants to run out and hire lawyers, many of whom just write to their Congressmen and ask the

Congressman if he would help. Then, of course, you don't hear anything more about it and the lawyer sends a fat bill to the claimant.

It seems to me, Mr. Chairman, that the approach taken in the legislation that is pending before the subcommittee would alleviate this lawyers, many of whom just write to their Congressmen and ask the situation in setting certain time limits in speeding up the hearing process and in reducing the backlog.

I concur with you, Mr. Chairman, that 6 years is too long to wait to reduce that backlog, that it must be done quickly, it must be done expeditiously, yet it must not be done in a manner to have wholesale rejection of claims simply for the purpose of getting rid of them and getting them off the social security desk.

That completes my testimony, Mr. Chairman. I thank the committee for its interest in this area and trust that the committee may move expeditiously to get legislation out that will alleviate this very serious problem.

[The prepared statement follows:]

STATEMENT OF HON. KEN HECHLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr Chairman, approximately one-half of the letters I receive from my constituents concerning their Social Security disability claims relate to the delays in processing their requests for hearings on their claims. The same delay is being experienced by those who have requested hearings on their black lung claims. Nearly two-thirds of the black lung mail I receive deals with this delay in the Bureau of Hearings & Appeals.

These people have waited at least nine months to a year, and sometimes much longer, before being notified about a date for their hearing.

In many cases, these people have no other income. But they do have families to clothe and feed, children to keep in school, and monthly obligations to meet. A great many of them do not own their own homes, and consequently must live from month to month, wondering how they will pay the next month's rent or mortgage. The small life savings they had has been used, from the time they first became disabled and applied for benefits.

As you may know, I requested an investigation by the General Accounting Office, into the delays in processing requests for hearings. The final report is not yet completed, but I'll be glad to provide it to the Committee when received. Hopefully, this report will help to pinpoint the causes for the delays and pave the way for new and better methods of processing the claims.

Some causes for the delays are clearly evident in the responses I receive from the Bureau of Hearings and Appeals, or from the Administrative Law Judges themselves. In many cases, the medical information in the file is not current and the hearing, or final decision must be delayed until additional medical information is obtained. Also, I have noted that a written decision is sometimes issued as long as four to five months after the hearing has been held. Could these problems be alleviated by enlarging the staffs of the ALJs? The staff could screen the files to determine if additional medical information is needed and obtain this prior to the hearing. Once the hearing has been held, and a decision issued by the ALJ, the staff could immediately prepare a final decision to be mailed to the claimant.

Also, if the ALJ determines, at the time of the hearing, that the claimant is eligible for benefits, he could tell the claimant, and thereby eliminate the length of time it takes to prepare a complete written approval.

Also, the ALJs feel that because of the increase in the number of approvals at the hearings level, a greater number of the claims should have been approved at a lower level. If so, the claims should be more carefully reviewed at the initial and reconsideration determination levels.

H.R. 8018 provides that a statement of the case and an informal conference be afforded the claiment when a request for reconsideration is made. Many times, after receiving the first denial notice, the person files a request for reconsideration without really understanding the reason for the denial, or knowing what additional evidence is needed in connection with his claim. And often, an explanation by a worker in the local Social Security office is not completely clear.

It would seem that another way to reduce the backlog of hearing requests would be to upgrade the ALJs now only able to hear black lung claims, from GS-14 to GS-15. Most of the black lung judges are familiar with the Social Security disability regulations and with some additional training could hold concurrent hearings on both disability and black lung claims.

I hope that the Subcommittee will carefully consider the legislation submitted to reduce the backlog of hearing requests, and report its findings to the full committee as soon as possible. It's time we quit regarding the disabled and aged as merely Social Security numbers and start showing compassion, zeal, interest and understanding and speed up their appeals.

Mr. **Burke**. Thank you. Are there any questions?

On this recommendation by Congressman Pepper, do you think it might be helpful if the Social Security Administration put out an instruction sheet to applicants for total disability? Of course, I am always afraid of the way they print these instruction sheets by the Federal Government. You read the instruction sheets of the IRS and they become quite confusing. Do you think it is possible for them to put out a simplified summary of information about what an applicant needs to do to protect his rights.

Mr. **Hechler**. That is certainly a helpful step, but it is just the beginning. I think it is just an attitude more than anything else. There are so many claimants who tell me they come into the office and they get the impression after several months of hassling back and forth that this is a case of the Government of the United States versus John Jones and the people on the other side are adversaries rather than individuals who are seeking the public interest by getting the maximum amounts of information, the maximum amount of help that can be given to the claimants. This is why the claimants frequently have to run to lawyers because they don't get the sympathetic ear they need.

I think such an instruction sheet would be helpful but beyond that it needs an attitude of complete cooperation, assistance, and a desire to get these cases out of the way just as fast as possible.

Mr. **Burke**. There being no further questions, the committee wishes to thank you for your appearance.

Our next witness is the distinguished William F. Goodling, Congressman from Pennsylvania.

STATEMENT OF HON. WILLIAM F. GOODLING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA, ACCOMPANIED BY NANCY NEWCOMER, CASEWORKER-SECRETARY

Mr. **Goodling**. I am Congressman William F. Goodling, and I have with me Nancy Newcomer, who has been a caseworker-secretary, handling situations such as this for the last 12 years.

I appreciate having the opportunity to appear here today on behalf of many of my constituents and thousands of citizens throughout the Nation who have been frustrated, mistreated, and in many cases impoverished because of the present disability claim system.

Although I recently cosponsored legislation introduced by Congressman Seiberling, entitled "The Social Security Rights Act," I believe that a total overhaul of the claim process may be needed. I hope that this subcommittee will move in that direction quickly, and not be satisfied with intermittent measures which may, in the long run, only compound the problems of the system and result in further aggravation to those in need of benefits.

Since Congressman Seiberling and several other cosponsors of the legislation have already testified as to the provisions of the bill, I will not reiterate what they have said. I would, however, like to add my name to the number who have already expressed their grave concerns about the delays which are inherent throughout the system, but particularly gruesome at the hearing and appeals level.

In the background material prepared by the staff of the subcommittee issued on September 17, 1975, I note that the median time period from a hearing request to disposition for the Philadelphia region—which serves my constituents—is now 266 days. This delay represents only a portion of the total time for processing a claim since the average time from the initial application for a disability claim to an award or a final denial is about a year and a half.

During the last several months I have asked my staff to keep a tally on the delays experienced by persons contacting me. I have been appalled at the number of potential beneficiaries who have been waiting years to get their cases out of limbo. These people may be statistics to some, but witnessing their lifestyles and listening to their exasperating experiences have left me distressed. If these persons are not eligible for benefits, such a decision should be reached as expeditiously as possible so that they may find some other way to put their finances and lives in order. I'm sure that just about every Congressman has cases which had the unfortunate experience of being closed because the potential beneficiary dies after waiting years for his case to be heard. Surely the anxiety caused to the claimant by long waiting periods has contributed to such a result in some instances.

When the Commissioner of the Social Security Administration testified before this subcommittee earlier this month, he stated that the backlog of cases is slightly less than 107,000 and indicated that progress had been made in reducing the backlog by some 6,000 from April of this year. I commend this slight reduction, but obviously it just isn't enough. The bold and creative steps which Commissioner Cardwell said had been taken by the Social Security Administration since January of this year to reduce the backlog will have to be increased. In addition to new steps, however, I believe we are going to have to witness better performance and coordination at the prehearing and appeals level if we are to get to the real root of this immense problem.

I am sure that this subcommittee could recommend the appointment of several hundred new administrative law judges, and staff support, to get rid of this backlog. I would not recommend this approach. This is the usual Federal approach to solving problems. I would much prefer to see that fewer cases need to get to the appeal level. Inadequate review at the lower level results in a reversal of initial denials of disability in 60 percent or 65 percent of the cases. In my opinion, this high rate indicates that something is definitely wrong with the whole system if determinations of disability can be so different at different levels. Either the decisions resulting from the hearings and appeal level are too lenient, or the initial decisions are too strict. More likely, it is a combination of both. But it is clear to me that a higher correlation between similar decisions at all levels of this system is necessary. I would hope we would not promote incompetence.

According to many of my constituents, better trained employees at the local level would be a great improvement. At the present time, the information which is passed on to potential beneficiaries is lacking in many instances. This is, of course, not the case with all those at the local level, but certain local offices have much higher rates of reversal at the hearing and appeal level than is normal. Such offices should receive close scrutiny by the regional offices. Better coordination between the different offices at all levels would eliminate practices which waste time and money such as duplicate replies which my office finds often. These replies are often conflicting, which only frustrates claimants further.

Even if a claim is finally solved, and the claimant promised a check, the delays and goofups in the issuing of these benefits are atrocious. The Social Security Rights Act addresses this problem in that it provides for the reissuing of a check to those already receiving benefits. I think that this provision would go a long way to ease the financial nightmares often associated with the current dilemma for those who don't find that expected check in the mailbox at the beginning of the month. Oftentimes these people have nowhere to turn. Instances of duplicate checks and intent to commit fraud would be readily identifiable in the majority of cases.

While my comments have been primarily directed at the appeals process, it is apparent that throughout the social security bureaucracy there are serious problems. The following are some specifics I would like to emphasize and reemphasize, called to my attention by Nancy.

Burden of work at all levels increased by illogical actions such as random mailing of notice of 8-percent increase to all recipients when those on special minimum primary insurance were not eligible to receive it. We have people who have come back three or four times for explanation of why they didn't receive this increase after they had gotten a notice with their June check saying it was coming.

Backlog is further complicated by telephoning a favorable report, and then sending a letter giving the same report about a month after the phone call. The telephonic report was allegedly to close out the case without taking time to write the letter, but then they write the letter anyhow.

In some instances we submit one inquiry, but we get an answer from the Baltimore office, the regional office, as well as the local office. One response would suffice and would eliminate the possibility of conflicting reports which confuse the constituent. Unfortunately, where we have received several responses, they are not always identical.

My district is served by four local offices. It seems significant that 90 percent of our cases come out of one local office. This would seem to indicate that certain areas of local operations bear improvement. If the personnel in local offices were more carefully screened, the burden of cases requiring special inquiry might be reduced.

The backlog at the appeal level is generally recognized as the greatest headache. However, simple matters such as address change, tracing of a missing check, or reissue to an estate of a check when the recipient is deceased are matters in which local office personnel seem ill-prepared to advise the public. Frequently, constituents make several visits to a local office about the same matter only to find that there is no record of their previous efforts in existence. Each time they will file anew, only to return and have to repeat filing. This again would seem to indicate that the backlog at the top may result from incompetence at the bottom.

Hopefully, there will not be serious consideration of adding large numbers of additional personnel to handle the workload. It may be that adequate training and careful selection could streamline the system and thus reduce the number of people involved in processing each claim. It is interesting to speculate on the dollar cost for personnel to handle each dollar received by beneficiaries. I am thoroughly convinced that the general public's impression of those who are elected to the Congress of the United States are based primarily on their contracts with the bureaucracy. I think it is very important that we insist that the bureaucracy handle these people as if they are what they are supposed to be, in fact, public servants. Many times the manner in which a constituent is handled is directly a reflection upon the Congressman because it is probably the only contact that this constituent has with the Federal Government. They probably don't even know the name of their Congressman.

So I think it is important that we make sure that these people understand that they are public servants, not policemen, not there to harass.

I hope that this subcommittee will have the opportunity to find solutions to many of these problems which affect millions of beneficiaries of the system but I would urge the members to tackle the appeals process as quickly as possible.

Thank you again for permitting me to testify.

Mr. Burke. Thank you.

Are there any questions? The committee appreciates your testimony.

The next witness is the Honorable Thomas N. Kindness.

STATEMENT OF HON. THOMAS N. KINDNESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Kindness. Mr. Chairman, thank you for the opportunity of appearing before the committee today. The problem you are investigating is obviously one that affects all parts of our country and one that is unfortunately growing.

To give you a better idea of the delay faced by my constituents who become involved in the hearing process, let me briefly mention three cases that have recently moved through my office.

The first involves an injured worker who contacted my predecessor in September of 1974 for assistance in obtaining disability benefits. His request was denied in October and in November of that year he requested a hearing. Even though he had detailed medical evidence of his injuries, it was not until August of this year—9 months later—that he received approval of his claim; and that approval was from the State agency, not the administrative law judge to which it had been referred.

This came about only because a group of claims examiners from the Bureau of Disability Insurance went to the offices of the regional administrative law judge, reviewed his voluminous backlog, and, where they found that additional evidence had developed, sent many cases back to the State agencies.

The second gentleman I will mention has not been so fortunate. He had originally applied for benefits in April of 1974. His request was denied, and so he requested a consideration in August of 1974. As of this date—11 months later—his claim is still pending before and administrative law judge in Cincinnati.

The third case involves a gentleman who originally applied for benefits in January of this year, was denied, and requested reconsideration in February; was denied again, and so requested a hearing in May. The current status of his case is summarized in a letter which I received from the administrative law judge in charge of the Columbus office dated September 9, 1975. It states:

> * * * We have a backlog of 631 cases. This backlog is in addition to the cases actually already assigned for hearing to the administrative law judges.
>
> The assignment of cases to judges for hearing is based on the date of the request for hearing by the claimant. At the present time the next case to be assigned is one in which the request for hearing was filed May 8, 1975. You can, therefore, determine as readily as I how soon his cases will be assigned for hearing.
>
> We deviate from our strict rule of chronological order only under unusual circumstances. If there is dire need, extreme hardship, impending death, or some other cogent reason, the case will be advanced for immediate hearing. If you have some basis that would justify advancing the foregoing claim for hearing. I shall be glad to do so.

In addition to the 3 cases I have detailed, I currently have 26 more very similar cases that have been pending at the administrative hearing level for from 4 to 7 months—this does not include the time the claimant has waited since he originally applied for benefits.

The causes and the cures for these delays are unquestionably complex topics, as I am sure your previous witnesses have attested to. I would like to emphasize three points.

First, it would be appropriate for this committee to examine the procedures followed by the State agencies. With a reversal rate of 50 percent there must be some points in the process of consideration which are subject to improvement. Perhaps if there was opportunity for more face-to-face contact at the initial stages of the appeal, State agency personnel could gain a more complete understanding of the case.

Second, much of the controversy centers around the abilities of the very limited number of administrative law judges to handle the cases assigned to them. I have been told that in some areas of the country, such as California, Puerto Rico, or even here in the District of Columbia, the problem is not in filling positions, but rather in these areas being authorized for enough positions to quickly rule on the referred cases.

In other more rural areas, the problem is finding enough judges to fill the positions which are open. It is my understanding that to qualify as an administrative judge for SSI cases, an applicant must be an attorney with bar membership and 4 years' experience. To handle black lung cases, the applicant must have 6 years of experience. And to handle social security cases, the applicant must have 7 years' work experience.

The pay level for these Social Security judges is GS–15, or $29,818. I think you will agree that finding a competent attorney with 7 years' trial experience who would leave his position for such a salary is not easy in many sections of the country, even with the attractive benefits of civil service employment.

The last and perhaps most important point relates to our colleagues. They must be made aware of the fact that each new piece of black lung or social security legislation we pass adds to the backlog of the review and appeals system.

I only hope that these hearings will generate that understanding. I would be happy to entertain any questions that the subcommittee may have.

Mr. BURKE. Without objection, your entire statement will appear in the record.

[The prepared statement follows:]

STATEMENT OF HON. THOMAS N. KINDNESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

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The first involves an injured worker who contacted my predecessor in September of 1974 for assistance in obtaining disability benefits. His request was denied in October and in November of that year he requested a hearing. Even though he had detailed medical evidence of his injuries, it was not until August of this year— 9 months later—that he received approval of his claim; and that approval was from the State agency, not the Administrative Law Judge to which it had been referred. This came about only because a group of claims examiners from the Bureau of Disability Insurance went to the offices of the regional administrative Law Judge, reviewed his voluminous backlog, and, where they found that additional evidence had developed, sent many cases back to the State Agencies.

The second gentlemen I will mention has not been so fortunate. He had originally applied for benefits in April of 1974. His request was denied, and so he requested a reconsideration in August of 1974. As of this date—11 months later—his claim is still pending before an Administrative Law Judge in Cincinnati.

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"The assignment of cases to Judges for hearing is based on the date of the Request for Hearing by the claimant. At the present time the next case to be assigned is one in which the Request for Hearing was filed on November 28, 1974. Mr. ———'s Request for Hearing was filed May 8, 1975. You can therefore determine as readily as I how soon his case will be assigned for hearing.

"We deviate from our strict rule of chronological order only under unusual circumstances. If there is dire need, extreme hardship, impending death, or some other cogent reason, the case will be advanced for immediate hearing. If you have some basis that would justify advancing the foregoing claim for hearing, I shall be glad to do so."

In addition to the three cases I have detailed, I currently have ten more very similar cases that have been pending at the administrative hearing level for from 4 to 7 months (this does not include the time the claimant has waited since he originally applied for benefits.)

The causes and the cures for these delays are unquestionably complex topics, as I am sure your previous witnesses have attested to. I would like to emphasize three points.

First, it would be appropriate for this Committee to examine the procedures followed by the State Agencies. With a reversal rate of 50 percent there must be some points in the process of consideration which are subject to improvement.

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I only hope that these hearings will generate that understanding.

Mr. BURKE. Are there any questions?

Mr. PICKLE. I have no questions, Mr. Chairman. I welcome Mr. Kindness to the hearing, and I enjoyed your testimony.

Mr. BURKE. Thank you very much.

The committee now will be in recess until 1:30. We will transfer the hearing to room H–208 in the Capitol. So at that time the hearing will reconvene in room H–208 and we will hear the rest of the witnesses.

[Whereupon, at 12:06 p.m., the subcommittee recessed, to reconvene at 1:30 p.m. in room H–208, the Capitol.]

AFTERNOON SESSION

Mr. BURKE. The committee will be in order.

Our next witness will be the Honorable Robert C. McEwen.

We welcome you here to the committee. You may proceed with your statement.

STATEMENT OF HON. ROBERT C. McEWEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. McEWEN. Thank you, Mr. Chairman, I appreciate coming before your subcommittee this afternoon.

I am pleased to have this opportunity to discuss with you some of the delays that my constituents have encountered in the processing of their social security appeals cases.

I would like to commend you, Mr. Chairman, for scheduling hearings to focus attention on this problem at a time when the full Ways and Means Committee is devoting its time and energy to the complex problems of tax reform.

I know that the work that has gone into preparing and holding these hearings has been an extra effort, and I am speaking for scores of my disabled constituents when I express my appreciation for your concern.

It has been my policy to give top priority to constituents who are seeking the resolution of a Federal matter which has become entangled in the bureaucracy. I am especially concerned with cases involving people who, by reason of disability, age, or illness, are at their means' end as well as their wits' end. Since I came to Congress in 1965, my office has been concerned with hundreds of cases involving disability claims. Delays and errors have not been uncommon in disability cases, but the length of the delays and the frequency of errors have been increasing for the past year and a half.

A survey of the cases handled in my office revealed that the amount of time required to process a disability claim was more than a year in most cases. A great many of these claimants are heads of households and their diminished earning power resulting from illness or disability severely affects their families.

In one case, a 25-year army veteran, who had contracted cancer, contacted me after he had received no acknowledgment of his claim for 6 months. He was forced to support his family of four on a $400 month army retirement check until the award was finally made 10 months after his initial claim. He was given some retroactive benefits, but unfortunately he passed away less than a month after his claim was approved.

In another case, a man who had been unable to work since January of 1974 applied for social security disability and SSI in March of that year. His claim was finally approved in June of 1975. A case that is still pending involves a man who was forced to stop work after an automobile accident in 1973. He requires further surgery and will not be able to return to his job until the spring of 1976, at the earliest. He has been able to support his wife and four children with his employer's benefit plan but those funds will run out in December and he will undoubtedly be forced to apply for welfare benefits.

This is only a small sample of the disturbing cases I have seen but it illustrates the point that justice delayed is justice denied. I have no idea how many claimants are forced onto the welfare rolls as a result of protracted disability applications, but any number would be too many.

In February of this year, I met with some 80 citizens, and a number of county legislators, at a public meeting to discuss social security problems. Most of the complaints centered on problems with the social security disability system, and the cases I explained above typify the frustrations that these people had experienced.

I do not believe that these problems are confined to the people from the 30th Congressional District of New York. This belief is reinforced by the number of my colleagues who signed a letter to Chairman Ullman requesting these hearings and the number of members who testified before this committee.

Although we may have different ideas about the reasons for the delays and errors, I believe most of the Members who have been disturbed by these problems would agree that an average of more than 18 months from application to award or final administrative denial is too long.

A recent study reported by the staff of this subcommittee states that a year and a half delay is average and also points out that roughly half of this time is attributable to hearings. I hope that this subcommittee will carefully explore the role of the hearing process in the social security disability and SSI disability system and the procedural rules governing hearing schedules.

My own congressional district covers the northern tier of New York State and its rural character presents additional problems for my constituents. Our largest city has a population of 31,000 people and does not qualify as a hearing center. The hearing examiners must travel to the claimants.

In one case, a claimant who had requested a hearing had to wait several months because the hearing examiner could not travel until a sufficient number of claimants were scheduled for hearings in Northern New York.

I brought this matter to Commissioner Cardwell's attention, and he informed me that claimants are not customarily given the option of having their hearings at the hearing office rather than in the vicinity of their home. There probably are claimants who are unable to travel, but I believe those who are willing and able should be given the opportunity to expedite their case by having the option of traveling to a hearing office rather than wait for the administrative law judge to come to them.

Notwithstanding the delays that I have spoken of, I must candidly admit that I do see a genuine and sincere effort on the part of Social Security Administration district offices to assist the applicants. Their efforts are frustrated, however, by what often appears to be a faceless but frightful monster in Baltimore. That creature is "the system."

I know of Social Security Administration employees at the district office level having to plead with computerlike voices at the other end of telephone lines in Baltimore for some kind of identification in the hope of being able, perhaps, to speak with that same person sometime again in the future on the same case. These employees, I know, are often as frustrated with the bureaucracy of "the system" as the applicants themselves.

My district office in northern New York is in daily contact with at least one of the five Social Security Administration district offices in my congressional district. I am pleased to report that our dealings have left us with the highest regard for the directors, acting directors, and staffs of those offices. And likewise, our dealings with the administrative law judges serving my district have been favorable.

As recently as Wednesday of this week, one of the judges met with my special assistant and informed him that the three judges in his office each have a caseload of approximately 150 cases, but, thanks to the addition of clerical and legal assistance, he foresaw improvement.

Assuming that his prediction of progress in this regard extends beyond northern New York, it would appear to me that some emphasis should be placed at solving the Baltimore-related delays.

I know that a wide variety of recommendations have been made to this committee and I look forward to studying any legislative initiatives you may develop as a result of these hearings.

Mr. Chairman, as a member of the House Appropriations Committee, I pledge to work with you to implement any budgetary changes which you believe may be appropriate. I applaud your initiative in calling these hearings and I thank you for this opportunity to appear.

Mr. BURKE. Thank you, Congressman McEwen.

It seems that your story is the same as that of all the other Congressmen that have come before the committee. Everyone seems to be experiencing the same problems. We do appreciate your appearance. Thank you.

Mr. McEwen. Thank you, Mr. Chairman.

Mr. Burke. I notice that Congressman Paul Rogers is here.

We will be pleased to recognize you now, Congressman Rogers.

STATEMENT OF HON. PAUL G. ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Rogers. Thank you very much, Mr. Chairman, and I appreciate the chairman of the committee allowing me to testify this afternoon.

First of all, I want to commend the subcommittee for holding this set of hearings. I think it will be helpful in developing a record for action and hopefully resulting in some action on a very serious problem that affects so many people today.

I know you have heard from a lot of experts, from a lot of our colleagues as well, and it really is difficult to convey the frustration I think a Member of Congress feels in dealing with these problems.

I know when I started to come over here I looked at a few cases I felt we must get a lot of and the first two I thought were sufficient to show the frustration we are feeling in Florida.

A constituent came to my district office in January and requested a hearing, a claim had been denied for disability benefits.

He was advised it would be 7 months before a hearing could be scheduled and he explained, of course, that he did not have the resources to sustain himself with that long a delay.

I intervened in his behalf, hoping that that might expedite the case but maybe he would have been better off not coming in because it ended up that the administrative law judge took 9, not 7 months, although he found for him, he was due it all the time, but he had to wait 9 months to get it.

Then the second case, a constituent who was a 100-percent disabled veteran. He applied for his social security disability benefits on May 22. On July 31 he was denied benefits after reconsideration, then in August he requested a hearing, in September he was advised it would be 2 or 3 months before they could even get to hearing.

It would be 5½ months later, February of this year, the hearing was held March 6, 2 years almost after the application. He was informed then that he was entitled to be classified as disabled under social security. So these two cases, I think, point up the problem in Miami where we have to have our cases handled. They are presently pending some 954 cases awaiting hearing by administrative law judges.

The appellants have been waiting almost 200 days from the time of application and then, of course if it is appealed, that's another almost hundred days there.

So I would like to emphasize to the subcommittee that each of these delays does mean severe hardship and I am sure you are very much aware of it, you have heard of case after case.

So I would not presume to offer any answer, but I would hope that this committee can address itself, and I know you will, to solution of these problems.

I would hope you would consider that maybe the HEW administrative law judges ought to be placed on a par pay scale with those comparable in those positions so you can maintain and keep people that are competent, so you don't have too much turnover rather than having to lose them all the time.

They ought to be recruited and trained in sufficient numbers to move the caseloads we know we are experiencing.

Then I would hope the appeals process could be accelerated and reconsideration level personnel provided again with sufficient numbers to insure reconsideration within proper time limits.

Third, a claimant should be granted face-to-face formal conference at the consideration level both to provide a more complete basis for consideration and to provide in the cases of denial, an explanation of the basis of that action.

I know it is not going to be easy to bring all the solutions about. It is having a very adverse impact in Florida. I commend you for having these hearings and I am grateful for your allowing me to bring this to your attention.

[The prepared statement follows:]

STATEMENT OF HON. PAUL G. ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, it is a pleasure to appear before the Subcommittee this afternoon. I commend the Subcommittee for holding this set of hearings which should be most helpful in developing a record for action on one of the most serious problems affecting the operation of any federal program today—the backlog of appeals in Social Security cases.

I know you have had the benefit of testimony by many experts in this field, and so I take this opportunity only to offer the opinion, based on the experience of my constituents in South Florida, that this problem is real, is causing great hardship, and is growing daily.

It is difficult to convey to you the sense of frustration I have experienced in dealing with this problem. As I prepared to appear before you today, I thought I would have my staff pull several cases which were exemplary of the impact of this situation on people in south Florida. We didn't have to go very far—the very first two cases were enough, and with the Subcommittee's indulgence, I would like to place them in the record.

In the first case, a constituent came into my District office on January 21st of this year, advising us that he had requested a hearing on the denial of his claim for disability benefits. He had been advised that it would be seven months before a hearing was scheduled, and explained that his resources were exhausted and he could not wait that long.

I intervened on his behalf, with the understanding that this would "expedite" the case. Perhaps he would have been better off without me—the Administrative Law Judge found him eligible for the benefits on September 25th, nine, not seven months later.

Let me share with you the dates of the second case. This constituent, a 100% disabled veteran, applied for Social Security disability benefits on May 22, 1973. On July 31, 1974, he was denied benefits after reconsideration. On August 27, 1974, he requested a hearing. On September 3, 1974 he was advised that it would be "2–3 months" before a hearing could be held. 5½ months later, on February 19th of this year, the hearing was held, and on March 6th, nearly two years after application, he was informed that he, a 100% disabled veteran, was also disabled within the meaning of the Social Security law.

Mr. Chairman, these cases are indicative of a problem which is being felt across the country, but especially in such areas as Florida. In Miami, there are presently pending 954 cases awaiting hearings by administrative law judges. These appellants are waiting an average of 189 days from the time of application to the disposition of the case. If the appellate council takes jurisdiction over their case, they can expect a further delay of 94 days.

I would emphasize to the Subcommittee that each day of these delays can mean severe hardship to persons who have often exhausted their resources by the time of their application for a hearing.

I certainly would not presume to offer "the" answer to these problems. I would offer several suggestions. First, the HEW Administrative Law judges should be placed on a par with the salary scale of the other agencies, if we are not to continue to lose qualified men and women from these positions. And the ALJ's should be recruited and trained in sufficient numbers to meet the new caseloads we are experiencing. Second, the appeals process should be accelerated, and reconsideration level personnel provided in sufficient numbers to insure consideration of claims within the new time limits. Third, a claimant should be granted a face to face informal conference at the consideration level, both to provide a more complete basis for consideration and to provide in cases of denial an explanation of the basis for the action.

I understand that legislation has been referred to the Subcommittee which would provide for such changes, and I would commend these suggestions to your consideration as you delve into this problem.

I know you may develop solutions along a different line as a result of the testimony you have received in these hearings. But whatever course you may choose, I would only impress upon you the need for prompt action. In Florida, growing numbers of persons in great need are feeling the impact of these delays every day. I will be glad to be of any assistance possible to you in this work.

Thank you very much.

Mr. BURKE. Thank you, Mr. Rogers.

Mr. Steiger.

Mr. STEIGER. I thank the gentleman from Florida. Your litany is certainly shared by every one of us. It is good to have you here. Thank you.

Mr. BURKE. Thank you, Mr. Rogers, for doing such a good job.

Mr. ROGERS. Thank you, Mr. Chairman.

Mr. BURKE. Our next witness is Hon. Richard Nolan of Minnesota. You may proceed, Congressman Nolan.

STATEMENT OF HON. RICHARD NOLAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. NOLAN. Mr. Chairman, by this time, I am sure that you have heard scores of horror stories about the delays encountered by people applying for social security disability insurance benefits. A check of the cases of those who have contacted my office for help revealed that most of these people have waited more than 15 months. That is 15 months of frustration, worry, and dwindling resources.

I am sure that the situation in Minnesota is not greatly different from that in other States. Some 25,000 individuals per year go to Minnesota social security district offices to apply for disability benefits. The cases are then sent to the Minnesota Department of Vocational Rehabilitation for verification. Five disability determination units—DDU—staffed with 43 examiners review medical evidence and make decisions. Agency goals call for 50 percent of the cases to be disposed of in 30 days with the balance of the cases completed within 3 months. According to a unit supervisor, the DDU often finds it difficult to obtain expert medical personnel to participate in the decisionmaking and therefore to meet these goals. The office lately has been forced to use medical residents in lieu of specialists, thus increasing the chances for error.

The situation on the State agency level is further complicated by a freeze on new personnel. Unfortunately, what this move saves in money it loses in time and efficiency.

Another factor which complicates and slows the disability determination process at the State level is the confusion which results when new instructions are sent from both regional and national headquarters. As often happens, local and State offices have no available means to integrate these new materials into existing manuals, and they often have no time to become acquainted with them. A prime example is the dilemma which the Minnesota Vocational Rehabilitation Division found itself itself in when the new Privacy Act went into effect September 27. The State agency had received its advanced instructions only 3 days before they were required to implement them. By the 26th, the final instructions had not yet arrived. This lack of leadtime confuses and hampers harried employees already struggling with changing regulations and increasing caseloads.

Of all the applications reviewed by the State agency, some 40 percent are initially denied. If the claimant has the perseverance to use the appeals process, however, his chances are better than 50/50 of eventually receiving benefits. The question is: What is it about the system that permits this level of reversals, and why must a final decision take so long?

I put this question to staff members at both the State agency and hearing levels. The DDU member suggested three reasons: (1) the condition of the claimant has deteriorated during the appeals process, (2) the SSA processing goals are too short, and haste creates mistakes, and (3) the administrative law judge at the hearing makes a "subjective" decision based on an interview with the claimant, while the State agency makes an "objective" decision based on an analysis of the records.

If a person is disabled when he first applies for disability benefits, the chances are good that 6 months of battling red tape during the appeals process has done nothing to improve his condition. As so often happens, the individual finds he must wait 12 months, without a job, before he can convince the SSA that he really is disabled and in need of benefits. And then, by another quirk in the law, if he does not apply for benefits within 14 months of the time he is disabled, he is unable to receive them. Pity the poor worker who does not know about this "Catch-22."

The State agency people say they need more time to make a sound disability determination, the administrative law judges say they need time to write decisions, the pending cases before the appeals council and the district courts are backed up for months. Once again the bureaucracy is given time to work while the claimant is expected to wait patiently in the wings. What is being done for him? He is without a job and, if he is lucky, he will have put enough money away in savings to see him and his family over this waiting period. But what if he has insufficient savings or, worse yet, none at all? If he has a home and a car, he cannot even receive welfare benefits until he has sold them and spent those resources.

Gentlemen, a certain amount of waiting is necessary, and it is expected, but we must revise the system so that the disabled individual is not penalized for delays and errors over which he has no control. If the system cannot make a decision within a reasonable amount of time, then some consideration should be given to issuing benefits to the claimant while his application is being processed. With reversal rates running at 50 percent, the amount of money given to those who are finally judged to be ineligible, would be insignificant when placed beside the payments to those who filed legitimate claims.

Another problem arises when individuals who are already on the rolls suddenly find that their disability checks have stopped coming for no apparent reason. Currently, no procedure exists for issuing duplicate disability checks. For a person who depends on this monthly check for his livelihood, a month or two without it creates a critical situation. I urge you to include in any new legislation a provision whereby all social security disability beneficiaries can recieve duplicate checks quickly and simply.

When I talked to the DDU staff member, she mentioned, with a certain tone of disdain in her voice, that the State agency makes its decisions "on the record" while the administrative law judge makes a subjective decision after an interview with the claimant. The ALJ, of course, denies this, but the dispute does point up an important difference in the determination of disability procedures. The State agency works from forms; they do not interview the claimant and are not influenced by the "human" factor. The ALJ works in a much different situation. Surveys have shown that a face-to-face hearing is more favorable to the claimant. With so much confusion surrounding the appeals process and so many different appeals formats, perhaps some consideration should be given to standardizing the procedure to include interviews by the State agency when one first applies. A system is only as good as its ability to handle exceptional cases, and an interview would assure proper treatment of extraordinary cases.

Finally, gentlemen, I urge you to keep uppermost in your minds the people this program is designed to help. The system is not designed for those who administer it but for those it serves. If a choice arises between the needs of an individual and the needs of the bureaucracy, there should be no question in our minds where the priorities lie. Conversely, we cannot expand a program or increase demands upon its personnel if we do not simultaneously insure adequate staff and funding to meet these new goals. The picture today is gloomy indeed for those who are awaiting decisions by social security offices, and I commend you for your efforts in trying to improve the situation.

Thank you.

Mr. Burke. Thank you Congressman Nolan.

I believe that completes the Members of the Congress that will testify.

We will now turn to Hon. John Rhinelander, Under Secretary of the Department of Housing and Urban Development.

We welcome you here to the committee and ask you to identify yourself.

STATEMENT OF JOHN B. RHINELANDER, FORMER GENERAL COUNSEL, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND PRESENTLY UNDER SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ACCOMPANIED BY DONALD GONYA, DEPUTY ASSISTANT GENERAL COUNSEL FOR THE SOCIAL SECURITY DIVISION IN HEW, AND FRANK DELL ACQUA, HEAD OF THE LITIGATION BRANCH

Mr. RHINELANDER. I am John B. Rhinelander, presently Undersecretary of the Department of Housing and Urban Development. Until 2 weeks ago I was General Counsel in the Department of Health, Education and Welfare, and I served as General Counsel for 2 years. During that period of time I spent a great deal of time on the problem which is the subject of your hearings.

Before I get to my prepared statement, I would like to introduce on my right, your left, Donald Gonya, Deputy Assistant General Counsel for the Social Security Division in HEW, and on my left is Mr. Dell Acqua, head of the Litigation Branch.

Before Mr. Gonya came to this Branch, he was regional attorney in Philadelphia, and between the two of them they have an enormous amount of expertise in this area and when we get to questions I would like to defer some of the questions to them. I know they will be very helpful.

I would like to discuss a number of topics, first in terms of the litigation and its impact on the Federal courts. The second relates more specifically to those legal issues before the courts which may fundamentally alter the operation of several social security programs.

Social security litigation has in recent years undergone tremendous increases in volume. In my prepared statement it lists the number of cases for each year. To shorten, I would emphasize that we think this year may see 7,000 new cases filed in the Federal district courts; this is calendar 1975. For the 1976 calendar it will be somewhere between 10,000 and 11,000 cases.

This year it may be running 1 to 2 percent of all cases filed in the Federal courts. Next year maybe it will be up to between 8 and 10 percent. So the first point I would like to make in this is the enormous volume of cases most of which are disability cases.

Mr. Chairman, in my statement I discuss the number of briefs which are filed by the General Counsel's Office in these cases. By way of example, through August 31, we have filed over 2,400 briefs in individual cases. We are dealing with, in any sense of the word, volume litigation.

A significant number of the cases which in fact go to the Federal district courts are remanded by the courts to the Social Security Administration. Again my statement has figures over the course of recent years. I don't think it is necessary to give them all now.

I would like to point out that when we speak of affirmance rate by the courts of social security decisions it is important to know whether or not the remands are either included or excluded in those figures.

If remands are excluded the affirmance rate over the last 3 years has been 84 percent, 85 percent, and 81 percent. If remands are included in that universe and we are looking at the percentage of cases which HEW wins, the percentage figures are lower.

Black lung cases have recently begun to be remanded in courts in very large numbers. As my statement indicates, of 1,260 black lung cases filed in the district courts in 1974, preliminary figures indicate that 242 have been remanded, while only 23 cases have been affirmed.

We do not have the information as to why that is happening. It is now being analyzed in the Bureau of Hearings and Appeals and in the General Counsel's Office of HEW.

Clearly, as the volume of cases increases in the district courts, we are having a problem here similar to but not quite as extreme as the problem of the Bureau of Hearings and Appeals which is the time it takes to dispose of cases.

In 1973 when there were only 2,500 new cases in the courts, the medium time for disposition was 10 months, with 10 percent disposed of in 3 months and at the other extreme, 10 percent requiring over 29 months.

I would like to point out to the committee one measure taken by a significant number of district courts to cope with the social security caseload and that is the routine assignment of the cases to magistrates.

This issue is currently before the Supreme Court of the United States. It will be argued this term. The Department of Justice is taking the position that routine assignment of social security cases to magistrates is inconsistent with the Magistrate's Act.

As a matter of policy, HEW and Social Security believes that that is not a poor policy in terms of speed with which cases are handled or the ultimate disposition of the cases.

My statement continues in terms of the way cases are in fact handled in the courts, basically they are handled in summary judgment proceedings on the record most of the time without oral argument.

I point out while these cases are not complex cases which are difficult to handle in the courts, the sheer volume of cases which is something which is a real concern to the Department of Justice and U.S. attorneys and the offices of the district court.

I would like to identify two problems which I believe are of direct interest to this committee which I believe was focusing on problems of delay in the administration area of this adjudicatory process early on.

This really affects the ability of the Government as defendant in this lawsuit to in fact respond in court under timely procedures.

In the past the Government's answer to the plaintiff's complaint has very often been delayed because under the law the Secretary is required to furnish a certified copy of the administrative record which includes the transcript of the administrative hearing held in each case at the time the answer is filed.

By way of aside, let me indicate those transcripts are not typed up until in fact a complaint is filed in court and we have, I think, already supplied to the staff of the committee detailed charts of time sequences which indicate the various steps through which the process goes.

The fact of the matter is in too many cases from a public policy point of view we have been required to go to the courts and request an extension of time in which to file an answer.

The answer is due within 60 days and the general practice in many courts is to seek an additional 60 days' time. Some of the district courts have responded to that and the names of those courts are identified at the back of my statement here, are refusing to grant extensions of time in social security cases.

The effect of that is that while we have been generally successful in getting those answers to the court in time it has adversely affected other cases which are in the courts. Again with this volume, with the need to produce a transcript, it is just not possible to get it all done within the 60-day limits.

Now, to reduce the time necessary for preparing the administrative record, and preparing an answer for filing of briefs, the General Counsel's office at HEW and the Bureau of Hearings and Appeals, Department of Justice, and the U.S. attorneys all have taken a series of steps which I think incrementally have helped to speed up the process and certainly have helped to stay even in that respect.

I think it is important to stress that in looking at the litigation side there is no easy way to handle what is a very high volume. It is important to take small steps which may help to get on top of the caseload. We are dealing with, I think the first fact is that we are dealing with over 1,200,000 disability claims being filed in a year, only a small percentage get into court.

The universe is very, very large to start with, and this is a large number of cases that go into the Federal court system.

Let me turn from the cases which deal with individual claimants to draw your attention to recent litigation which I think is of particular importance when you look at the administrative and adjudicatory processes both within the Social Security Administration and in the Federal courts.

There have been a significant number of constitutional cases which one way or another are challenging the delays which applicants encounter at various stages of the administrative process. Class actions have been filed in which plaintiffs allege they are suffering illegal delays in processing of their claims from initial applications through the hearing stages and review.

I believe I am correct in saying that in only one case has the court reached a decision. This was the case of *Santos* v. *Weinberger*, handed down in Boston.

Another line of cases, and one which is of particular importance, this is on administration of the social security program, the cases which challenge the failure to provide an oral evidentiary hearing before benefits are terminated. We have found that—a series of these cases have been filed in the district courts, many of them have been stayed pending a decision by the U.S. Supreme Court in the case of *Eldridge* v. *Weinberger*, scheduled to be heard before the court this coming Monday.

If the court follows its normal practice in the case the decision would probably be rendered sometime next spring. The key issue in that case is whether the *Goldberg* v. *Kelly* case applied to social security.

There is a similar line of cases with respect to the authority of the

Secretary of HEW to recoup overpayments made under the social security programs. A major case involving this issue, the Buffington and Biner case, was decided adversely to us in the district court and just yesterday I understand the ninth circuit affirmed that decision.

A copy of the opinion is not yet available here. We would be delighted to submit a copy to the committee if that would be your wish.

Mr. Burke. Without objection the record will be kept open.

[The information referred to above follows:]

United States Court of Appeals for the Ninth Circuit

[Filed, October 1, 1975]

No. 74–1611

Evelyn Elliott and Benito Molina, Individually and on Behalf of all Others Similarly Situated, plaintiffs-appellees,

v.

Caspar W. Weinberger, Individually and in His Capacity as Secretary, United States Department of Health Education and Welfare; and Sung Dai Seu, Individually and in His Capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare, defendants-appellants.

No. 74–3118, Opinion

Fannie Buffington and Frances Biner, Individually and on Behalf of all Others Similarly Situated, plaintiffs-appellees,

v.

Caspar Weinberger, Individually and in His Capacity as Secretary of the Department of Health, Education and Welfare, defendants-appellants,

74–1611, Appeal from the United States District Court for the District of Hawaii
74–3118, Appealed from the United States District Court for the Western District of Washington

Before: Browning and Trask, *Circuit Judges*, and Williams,* *District Judge*.

Williams, *District Judge:* These consolidated appeals by the Secretary of the Department of Health, Education and Welfare (hereinafter referred to as the "Secretary") challenge the judgments of two district courts requiring, *inter alia*, the Secretary to provide old-age and disabled social security beneficiaries the opportunity to request a hearing prior to the initiation of recoupment procedures, the purpose of such procedures begin the recovery of monies paid to such beneficiaries allegedly in excess of their legal monthly entitlements. In both these class action suits plaintiffs-appellees asserted that the procedures utilized by the Secretary in recouping excess payments denied them due process of law under the fifth amendment because their benefits were reduced or suspended without adequate notice of the reasons for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment of the Secretary's recoupment decision, and without affording them the opportunity to have a pre-recoupment hearing. *Elliott* v. *Weinberg*, 371 F. Supp. 960, 964 (D. Haw. 1974); *Buffington* v. *Weinberger*, Civil No. 734–732 (W.D. Wash., Oct. 22, 1974). The district courts held that mandamus jurisdiction was established under 28 U.S.C. § 1361,[1] and that the recoupment procedures violated the due process rights of these complaining recipients. In addition to proiding a hearing to any recipient who requested one, the Secretary was ordered to supply the recipients adequate notice informing them of their right to such a hearing, and the hearing, if requested, had to precede recoupment. While we are in substantial agreement with the general principle that a hearing must be afforded recipients prior to recoupment of their monthly benefits, we do not believe that such a hearing is constitutionally compelled unless the issues raised in a recipient's request for review of the Secretary's initial overpayment and recoupment determination are incapable of resolution upon written submissions and/or documentary proof.

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*Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

[1] In *Elliott* v. *Weinberger*, plaintiffs asserted that jurisdiction additionally existed under 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* The court in *Elliott*, however, expressly declined to decide whether jurisdiction could be properly predicated upon these sections, but noted in passing that support existed for either jurisdictional base. In *Buffington* v. *Weinberger*, the court found both § 1361 and § 701 *et seq.* to furnish the necessary jurisdictional basis.

THE STATUTORY AND PROCEDURAL BACKGROUND

The Social Security Act vests the Secretary with the power to recover lost funds in the event overpayments are made to recipients of old-age or disability benefits 42 U.S.C. § 404 provides in pertinent part:

"(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

> "(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchpater to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. . . .

"(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

The challenged government procedures are as follows: As of January 1, 1974,[2] all recipients subject to recoupment receive, thirty days before actual recoupment receive, thirty days before actual recoupment begins, form letters which set forth the reasons for the proposed recoupment, the availability of reconsideration (when a recipient asks for reconsideration, the correctness of the overpayment determination itself is being challenged), the conditions for waiver (when a beneficiary requests that his overpayment be waived, he is, in effect, conceding the debt but asking that it be forgiven or reduced), and the need to consult the local Administration office within thirty days if they wish to complain.[3]

The initial overpayment and recoupment notice sent to beneficiaries makes no mention of the forms needed for reconsideraiton or waiver, nor sets forth information about how to complete them. However, the beneficiary can obtain review of his case by setting forth, in a letter, the reasons why he opposes the overpayment determination or seeks waiver. When reconsideration or waiver consideration is requested, the Administration's decision is based upon a claimant's *ex parte* presentation of documentary evidence offered in support of his claim for relief. No oral hearing is given prior to the commencement of recoupment.

Furthermore, it is the Secretary's policy to immediately defer recoupment action upon the filing of a request for reconsideration or waiver. Claims Manual § 5503 (b), (c). Any deferral of recoupment beyond thirty days after the date of the initial notice lies completely within the discretion of the Administration.

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[2] At the time these suits were filed, those beneficiaries whose overpayments were determined from their "annual earnings reports" were not entitled to advance notice of recoupment. Rather, recoupment began immediately, subject to later consideration of the beneficiary's request for reconsideration or waiver. Plaintiffs Silva, Ortez, Vaquilar, Biner and Buffington all had recoupment procedures initiated against them on the basis of earnings reports filed with the Secretary. Following January 1, 1974 it has been the Secretary's practice to provide all such beneficiaries the same pre-recoupment notice as in other overpayment cases.

[3] Social Security Claims Manual § 5503(a) requires the Secretary to inform overpaid beneficiaries of their "right to request reconsideration" and of the applicable waiver provisions of the Social Security Act. Contrary to the Secretary's contention, the form letter notice does not apprise a beneficiary of his "right" to waiver consideration. Nor does the Claims Manual require such disclosure. Only the "conditions" of waiver need be revealed. Even as to reconsideration, the form letter fails to make clear that such re-appraisal is a matter of right rather than a mere possibility.

Although appellants claim that it is the Secretary's policy to defer recoupment indefinitely once a request for reconsideration or waiver has been filed (Claims Manual § 5503(c)), in plaintiff Biner's case social security checks were not forthcoming in either November or October of 1973, notwithstanding the fact that Biner filed a waiver request in mid-October 1973. Appellants attribute this oversight to administrative error.

If, after review of the information supplied by the beneficiary, the Secretary adheres to his initial determination that recoupment is appropriate, he notifies the beneficiary to this effect and resumes the withholding of benefits to satisfy the overpayment. If dissatisfied with this decision, the beneficiary may request an administrative hearing *de novo*, in which the beneficiary is provided an opportunity to present oral testimony and to cross-examine witnesses before an independent hearing examiner. 20 C.F.R. § 404.928–.929. However, recoupment is not suspended pending the outcome of this *de novo* hearing. The beneficiary is further entitled to appeal the hearing examiners' determination to the Appeals Council of the Social Security Administration (20 C.F.R. § 404.945), and to judicial review of the Appeal Council's decision pursuant to 42 U.S.C. § 405(g).

THE FACTS

In *Elliott*, plaintiffs Silva, Ortiz and Vaquilar (subclass one) were determined to have been overpaid by the Secretary based upon their own annual earnings reports. They all received the form letter previously mentioned indicating the reasons for the overpayment determination, the specific amount overpaid and the amount by which the recipient's subsequent benefit checks would be reduced or suspended altogether. These plaintiffs were additionally apprised of the possibility of reconsideration and the conditions of waiver. All of them contacted the Administration's local offices within thirty days of receipt of the letter. At the time the *Elliott* court rendered its decision, the Secretary had completed recoupment against two of these plaintiffs, but as to the other had deferred recoupment pending disposition of the suit.

Plaintiffs Elliott, Gaines and Yamasaki (subclass two) received notices more than 30 days before recoupment was to begin, the notice disclosing information similar to that contained in the notices sent to subclass one plaintiffs.[4] Plaintiff Elliott was notified that the overpayment determination was predicated upon "her receipt of both retirement and disability benefits when she was entitled to only disability benefits." *Elliott, supra* at 965. "Duplicate payments" was the reason given Gaines for his overpayment. And plaintiff Yamasaki was told that "a processing error" caused an overpayment to be sent to her. All subclass two plaintiffs contacted their district office within 30 days after receipt of the overpayment notice. Recoupment against Elliott and Gaines was deferred pending resolution of this case, whereas recoupment against Yamasaki has been completed. *Elliott, supra at* 965–66.

As to plaintiffs Buffington and Biner, their claims arose out of factual situations similar to those pertaining to three of the named plaintiffs in *Elliott*.[5]

Both Buffington and Biner are recipients of social security old-age benefits. Based on "annual earnings reports" submitted by plaintiffs, the Secretary determined that they had received overpayments of benefits, and consequently sought to recoup the overpayments from plaintiffs' future benefits.[6]

In 1973 Mrs. Buffington was entitled in her own right to old-age social security benefits of $80.50 per month. Based upon her husband's earnings record, she was also entitled to wife's benefits of $15.70 a month, resulting in total monthly benefits of $96.20 (she actually was receiving $89.90 per month due to monthly Medicare deductions of $6.30). In September 1973, plaintiff's husband filed an annual earnings report which showed that he had received earnings in 1972 which exceeded the statutory limit. Accordingly, the Secretary determined Mrs. Buffington to have been in receipt of a total overpayment of $78.60. Notice of the overpayment was sent to Mrs. Buffington on October 3, 1973, indicating that the overpayment would be withheld from her next benefit check. In early November she received a social security check in the amount of $11.30. Mrs. Buffington subsequently submitted a request for reconsideration to the local administrative office. On July 24, 1974 her request was denied and the original overpayment determination was sustained.

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[4] For a discussion of the major difference see note 2 *supra*.

[5] See note 2 *supra*.

[6] Pursuant to 42 U.S.C. § 403(b), deductions from social security benefits must be made when a beneficiary's earnings exceed the amount prescribed by the statute. To determine whether deductions are appropriate in any given case, a beneficiary who earns more than the statutory maximum is required to file an "annual earnings report" which sets forth the amount of wages earned by the beneficiary during the preceding year. The social security application form, and certain pamphlets sent to beneficiaries, advise the claimants of the filing requirements.

Mrs. Biner was found entitled to old-age social security benefits in November 1970. In November 1972, however, she notified her claims representative that she intended to cease working in December 1972.[7] The Social Security Administration in 1972 sent Mrs. Biner three checks in a total amount of $2,216.20, representing benefits for all of 1972.[8] However, the Administration subsequently discovered, as a result of a cross check with Biner's former employer, that Biner had earned income in excess of the statutory amount for 1972. Thereupon, the Secretary requested Mrs. Biner to file an annual earnings report, which she submitted on August 28, 1973; and it was upon this basis that the overpayment was determined.

In the latter part of September 1973, Mrs. Biner was notified that she had been overpaid, and, consequently, her benefits would be suspended until the entire amount had been recouped. She was also supplied with a facsimile of the form letter referred to earlier. She received no benefit checks for October 1973. In Mid-October 1973 Mrs. Biner received a letter from the Administration containing "waiver" forms which she was instructed to fill out and return to the district office if she wished to do so. Mrs. Biner completed the forms and mailed them to the local office. However, submission of this request for waiver consideration did not halt recoupment proceedings. Moreover, on November 19, 1973, Mrs. Biner was informed that she was at fault in retaining the checks and, consequently, no waiver would be permitted. She was also informed that the original suspension of her benefits had been adjusted so that $50.00 per month would be withheld from her regular benefit payments.

During the latter part of 1973 Mrs. Biner twice requested reconsideration of the Secretary's overpayment decision. Again, recoupment was not halted. On April 8, 1974, however, the Secretary adhered to his initial determination that recoupment was appropriate, and continued to deduct amounts from Mrs. Biner's subsequent benefit checks. In late May or early June of that year, Mrs. Biner requested and was granted on October 21, 1974, an administrative hearing to review the propriety of the Secretary's recoupment decision. After oral hearing, the administrative law judge sustained the Secretary's decision. Appeal of the judge's ruling is presently pending.

THE DISTRICT COURTS PROPERLY EXERCISED JURISDICTION UNDER 28 U.S.C. § 1361

The Secretary contends that the district courts erred in assuming jurisdiction over these cases pursuant to the Federal Mandamus statute, 28 U.S.C. § 1361. Mandamus has traditionally been viewed as appropriate to compel officials to comply with the law only when the claim is clear and certain and the duty of the officer is ministerial and "so plainly prescribed as to be free from doubt." *United States* v. *Walker*, 409 F. 2d 477, 481 (9th Cir. 1969).

Typically, mandamus has been limited to cases in which statutory or regulatory duties were sought to be enforced. Recently, however, in *Knuckles* v. *Weinberger*, 511 F. 2d 1221 (9th Cir. 1975), this court held section 1361 to supply the necessary jurisdictional basis when a constitutional duty is made clear by subsequent judicial interpretation. In *Knuckles* we concluded that a district court had section 1361 jurisdiction to consider constitutional claims asserted against the Department of Health, Education and Welfare's summary suspension of social security payments. In so holding, we made it clear that it is not essential to a finding of jurisdiction that the constitutional duty sought to be enforced be clear beyond all doubt from the outset of the litigation. See also *Brown* v. *Weinberger*, 382 F. Supp. 1092 (D. Me. 1974). All that is required is that plaintiffs avoid asserting unsubstantial claims. *Mead* v. *Parker*, 464 F. 2d 1108 (9th Cir. 1972); Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Non-Statutory' Judicial Review of Federal Administrative Action," 81 Harv. L. Rev. 308 (1967). If we were bound to first determine the existence of a duty on the part of the Secretary as a prerequisite to finding jurisdiction under § 1361—an approach urged upon us by the Secretary—we would, in essence, be disposing of these cases on their merits—an exercise wholly inappropriate in deciding the threshold question of jurisdiction.

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[7] There is considerable dispute as to whether plaintiff Biner also informed the district office that her earnings would not exceed the statutory maximum in 1972. The Secretary contends that plaintiff represented to her claims representative that she would not have earnings above $1.680 for the year 1972, and that based upon this representation the Secretary issued Mrs. Biner $2,216.20 in excess benefit checks. Plaintiff Biner, on the other hand, claims that her purpose in contacting the local office was to ensure that she would begin receiving her benefits promptly after her retirement in December 1972, and, as such, would only have had cause to inform the office of the date of her retirement, not the amount of income she earned during 1972. In any event, she exceeded the earnings maximum in 1972—the year for which she received the benefit checks at issue here.

[8] It is unclear whether Mrs. Biner knew or should have had reason to know that these checks represented benefit payments for the year 1972. The Secretary contends that enclosed with at least the first check was a letter which indicated that the check was intended as back payment for 1972. Excerpts of this letter which are quoted in the affidavit of the Deputy Director of the Bureau of Retirement and Survivors Insurance of the Social Security Administration do not bear this out. *Buffington* Tr. 311. On the other hand, Mrs. Biner asserts that no explanation whatsoever was furnished by the Administration articulating the purpose in its sending this check.

In the instant cases, the allegations contained in the complaints present substantial constitutional claims, namely, that *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), compels the conclusion that the procedures instituted by the Secretary deprive plaintiffs of their property without due process of law. While section 404 of the Social Security Act vests the Secretary with discretion in establishing procedures to recover overpayments, he may not institute procedures which violate the fifth amendment. Precedent clearly demonstrates that the applicability of the *Goldberg* rationale to the instant circumstances is not so tenuous as to seriously call into question the substantiality of plaintiffs' claims here. The district courts therefore properly assumed jurisdiction under § 1361 to decide whether the Secretary had abused his discretion.[9] *Accord Frost* v. *Weinberger*, 515 F. 2d 57 (2d Cir. 1975); *Mattern* v. *Weinberger*, Civil No. 74–1776 (3d Cir., June 3, 1975) (slip opinion); *Martinez* v. *Richardson*, 472 F. 2d 1121 (10th Cir. 1973).

THE CLASS ACTION

The district court in *Elliott* certified the Silva, Ortiz and Vaquilar plaintiffs as representatives of a subclass of old-age beneficiaries resident in Hawaii subject to actual or possible recoupment of overpayments as a result of their own annual income reports. The Elliott, Gaines and Yamasaki plaintiffs were certified as a subclass repesenting recipients of old-age and disability benefits resident in Hawaii who were subject to actual or possible recoupment for reasons other than the filing of annual income reports. The court ordered (1) the posting of a notice in every local social security office; (2) the publishing of an advertisement in a non-legal section of two newspapers of general circulation; and (3) the inclusion of a notice of the suit in every letter from the Administration informing the recipient of its overpayment determination. The notice informed the members of the class of the pendency of the suit, of their right to intervene, and of their right to question the adequacy of their representation. *Elliott* Tr. 199–201. The governmen takes no issue with the *Elliott* court's class certification order or with the adequacy of the notice provided.

The *Buffington* court certified the two named plaintiffs as representatives of a nation-wide class of persons eligible for social security old-age and survivors' benefits under 42 U.S.C. § 402 "whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court excepted from the class residents of Hawaii and the Eastern District of Pennsylvania and those individuals involved in other litigation challenging the Secretary's procedures in recouping benefits without prior notice and hearing. *Buffington* Tr. 422–24. No notice whatsoever was provided members of the certified class.

The Secretary contends that the failure to order that notice be provided to the class was a violation of due process and that the class order must be declared invalid, reducing the effect of the judgment solely to the two individuals named as plaintiffs. The Secretary further argues that the district court abused its discretion in certifying a nation-wide class. We disagree.

There is little doubt that the district court's certification order satisfies the terms of Fed. Rule of Civ. Pro., Rule 23(c) (1) and (3). Furthermore, contrary to the Secretary's suggestion, this action is plainly of the type described in Rule 23(b)(2), not 23(b)(3). Although plaintiffs seek recovery of monies recouped from their monthly benefit checks, their primary purpose in bringing this action is to enjoin the Secretary from recouping such sums without providing social security beneficiaries a preceding hearing. It is only logical that as a necessary part of their claim plaintiffs would seek to recover money which they believed to have been retrieved pursuant to the procedures sought to be enjoined. In short, pecuniary recovery is purely incidental to this suit's principal purpose, and consequently this action is properly certifiable under 23(b)(2). *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971). In similar cases, too numerous to cite here, class certification of an essentially (b)(2) action was not precluded simply because monetary benefits were an inevitable by-product of the recovery of the injunctive and declaratory relief prayed for. See cases cited in 3B Moore's Federal Practice, § 23.40, at 23–652 to 23–654 (1974), and 1975 Cum. Supp. at 82 n. 19. In any event, the *Buffington* court's judgment did not award plaintiffs damages.

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[9] Having found an adequate jurisdictional basis under the Mandamus Act, it is unnecessary to decide whether the Administrative Procedure Act or 28 U.S.C. § 1331(a) also furnish an independent source of jurisdiction.

Under Rule 23(c)(2) notice is mandatory in a (b)(3) class action. And the Supreme Court has so held. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Secretary contends that the *Eisen* rationale should be extended to cover all class action, including, naturally, (b)(2) actions. However, even the *Eisen* Court acknowledged that the notice requirements of subdivision (c)(2) are inapplicable to (b)(2) class actions. *Id.* at 177 n.14. Rather, Rule 23(d)(2) operates to make notice discretionary with the court in (b)(2) actions.

The weight of authority supports an interpretation—consistent with due process requirements—of Rule 23 which does not require notice in every (b)(2) class action. Compare *Katz* v. *Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *Woodward Rogers*, 344 F. Supp. 974, 980 n.10 (D.D.C. 1972), *aff'd*, 486 F. 2d 1317 (D.C. Cir. 1973); *Yaffe* v. *Powers*, 454 F. 2d 1362, 1366 (1st Cir. 1971); *Souza* v. *Scalone*, 64 F.R.D. 654, 659 (N.D. Cal. 1974); *Johnson* v. *City of Baton Rouge, La.*, 50 F.R.D. 295, 299 (E.D. La. 1970); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619 (D. Kan. 1968); 3B Moore's Fed. Prac. ¶ 23.55, at 23–1152; 7A Wright & Miller, Fed. Prac. & Proc., Civil § 1786 (1973) [notice not required in (b)(2) action] with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76*, 470 F. 2d. 73, 75 (7th Cir. 1972) *cert. denied*, 409 U.S. 1085 (1972); *Zielstra* v. *Tarr*, 466 F. 2d 111 (6th Cir. 1970) [notice required].

The seminal case upon which most, if not all, courts requiring notice rely is the Second Circuit's decision in *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564–65 (2d Cir. 1968), in which the court by way of dicta stated that "notice is required as a matter of due process in all representative actions." *Id.* at 564. However, in *Frost* v. *Weinberger*, 515 F. 2d 57, 65 (2d Cir. 1975), the Second Circuit rejected its earlier pronouncement in *Eisen* and specifically ruled that *Eisen's* statements with respect to notice only applied to class actions brought under provisions of Rule 23 other than (b)(2). Indeed, even before *Frost* some district courts in the Second Circuit resisted *Eisen's* inflexible due process approach to (b)(2) actions, and instead read *Eisen* to say that notice was required in class actions when due process so required. *Lynch* v. *Household Fin. Corp.*, 360 F. Supp. 720, 722 n.3 (D. Conn. 1973).[10]

Contrary to the Secretary's suggestion that the distinction between (b)(2) actions having monetary repercussions and (b)(3) actions is one solely of form of relief sought and not one of substance, relevant authorities have oft stated that the need for notice in a (b)(2) class action is *de minimis* simply because of its fundamental differences from a (b)(3) suit. As the Advisory Committee in its Note accompanying the proposed revised, now adopted, Rule 23 implies, the strict (c)(2) notice requirement is inapposite to a (b)(2) class because (b)(2) classes will tend to be more cohesive and unified so that adequate representation reduces the need for notice. See 39 F.R.D. 106.

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[10] Likewise, district courts in the Sixth Circuit have not uniformly chosen to follow the decision in *Zielstra* v. *Tarr, supra;* one court finding *Zielstra's* statement that due process required notice in all class actions purely dictum, "since the Court of Appeals held that the District Court did not have subject matter jurisdiction of the case which was on appeal." *Watson* v. *Branch County Bank*, 380 F. Supp. 945, 960 n. 11 (W.D. Mich. 1974). *Cf. Alexander* v. *AVCO Corp.*, 380 F. Supp. 1282, 1286 (M.D. Tenn. 1974).

It is unclear where the Fifth Circuit stands on the notice question. In *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (5th Cir. 1969), without discussing due process requirements, the court implied that notice in (b)(2) actions is not required. In Justice Godbold's specially concurring opinion he states that 23(b)(2) "does not require notice." *Id.* at 1127 n. 1. Acting in apparent harmony with *Johnson*, the Fifth Circuit affirmed a Florida district court decision which held notice to be inappropriate in (b)(2) class actions. *Mungin* v. *Florida East Coast R.Y. Co.*, 318 F. Supp. 720, 732 (M.D. Fla. 1970), *aff'd*, 441 F. 2d 728 (5th Cir. 1971), *cert. denied*, 404 U.S. 987 (1971). On the other hand, the Fifth Circuit upheld a district court decision in which *Eisen* was followed and notice was found necessary in a (b)(2) action. *Pasquier* v. *Tarr*, 318 F. Supp. 1350, 1353–54 (E.D. La. 1970), *aff'd*, 444 F. 2d 116 (5th Cir. 1971). Perhaps it is fair to infer that at least the Fifth Circuit does not ascribe to the procrustean view that notice is required in all representative actions, rather whether *vel non* notice is mandated depends on the circumstances involved and the applicability of relevant due process considerations.

"In representative actions brought under the other provisions of Rule 23(b) [provisions other than 23(b)(3)], the class generally will be more cohesive—for example, in many instances each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. 7A Wright & Miller, *supra*, § 1786, at 143."

To the extent that absent class members might, as a matter of policy disfavor the position taken by named plaintiffs, defendants are usually more than adequate stand-ins for the purpose of presenting the policy arguments to the court.

"Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court.

"In keeping with this philosophy, class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions. [*Air Line Stew.* v. *American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973); *Johnson* v. *City of Baton Rouge, supra; Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125, 130 (S.D.N.Y. 1966)]. Because they do not have the alternative of bringing a separate suit, notice really serves only to allow these members the opportunity to decide if they want to intervene or to monitor the representation of their rights". [*Souza* v. *Scalone, supra*, 64 F.R.D. at 659; *Watson* v. *Branch County Bank, supra*, 380 F. Supp. at 959].

We are of the opinion that the better reasoned view counsels against requiring, under due process principles, notice in every (b)(2) action. Only when the purposes in providing class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the action to, for example, submit views as amici curiae, are in need of being served, does due process require the direction of some sort of notice to absent members of a (b)(2) class. In the instant case no such special circumstances exist to impel us to overturn the *Buffington* court's decision not to provide notice.

There is no question but that plantiffs here are represented by skilled and experienced counsel. Their record here and at the district court level is testimony to this commendation. When, as here, absent members' interests are adequately assured of being represented because there are no money damages involved, no significant factual dispute is in need of resolution, the only issues raised are constitutional, and there is no serious question as to the competency of counsel, notice to the class serves no apparent purposes. *Lynch* v. *Household Fin. Corp., supra; Woodward* v. *Rogers, supra*. The presentation of additional individual claims would have complicated the suit and protracted it to the detriment of the class as a whole. The named plaintiffs' claims are typical of the class, and additional plaintiffs are unnecessary. The constitutional issues involved in the suit have been exhaustively briefed by counsel and fully canvassed in the cases and commentaries, thus rendering additional supplementation by absent members as amici curiae superfluous. *Watson* v. *Branch County Bank, supra*. For all intents and purposes, the class members of the instant class have received their functional equivalent to a day in court.[11]

The Secretary's claim that the *Buffington* court abused its discretion in certifying a nation-wide class is similarly unpersuasive. In reviewing the designation of a class by the trial judge the appellate court should allow the broadest discretion. *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir.

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[11] That Buffington's class determination forecloses absent members from bringing individual suits thereafter, in and of itself, is not a factor militating against certification of a (b)(2) class action. If it were otherwise, no class actions could ever be certified under (b)(2). This is so because in (b)(2) actions absent members, regardless whether they receive notice or not, cannot excuse themselves from the litigation or avoid the res judicata effects of the judgment entered therein. Compare *Air Line Stew.* v. *American Airlines, Inc., supra,* 490 F. 2d at 642, with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76, supra,* 470 F. 2d at 75. Indeed, (b)(2) actions are generally preferred for their wider res judicata effects. *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441, 447 (5th Cir. 1973).

1969). Furthermore, nothing in Rule 23 indicates that a class should not be designated because it is too large. Certification of a natural class action is not unknown in the federal courts. *See Woodward* v. *Rogers, supra.* The Secretary does not cite, nor can we find, any authority which supports his rather novel theory limiting (b)(2) class actions because of their numerosity and manageability problems. By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a (b)(2), class action. And as a practical matter, since plaintiffs seek no damages, and because notice is not required to be directed to these class members, there simply are no manageability problems here involved.

In short, the *Buffington* suit strikes us as the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2). The Secretary has acted on grounds generally applicable to all members of the class and final injunctive and declaratory relief with respect to the whole class is appropriate. Even if we required the *Buffington* suit to proceed on behalf of the named plaintiffs only, the injunctive relief awarded in this suit would necessarily operate in favor of all social security old-age and survivor benefit recipients. It would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. The Administration wold be besieged with suits seeking the vindication of each and every social security recipient of old-age and survivors' benefits subject to the Secretary's recoupment procedures. With a copy of this decision in their hands, ever-watchful legal-assistance attorneys would wreak havoc on the administration of the Secretary's recoupment programs. Multiplicity of actions based on the same constitutional claims advanced here would be the inevitable result. Obviating such unnecessary duplication is the very pupose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper, but it also will effectuate the interests both of judicial administration and of justice.

THE MERITS

The principal case upon which plaintiffs rely is *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). There the Supreme Court held that a pre-termination evidentiary hearing was required before a welfare recipient's benefits could be terminated. Stressing the recipient's "brutal need" in continued payments, the Court found that in the balance "the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." *Goldberg, id.* at 266.

Plaintiffs contend that the *Goldberg* decision compels a finding that pre-recoupment hearings are constitutionally necessary when the Secretary determines that overpayments have been made to social security old-age and disability beneficiaries and seeks to recoup those overpayments.

On the other hand, the Secreteary argues that, for the following reasons, *Goldberg* should be read narrowly, and thus determined inapposite to the cases here: (1) the Secretary's present "written hearing" is adequate to establish the "probable validity" of the Administration's overpayment determination; (2) the impact upon a social security recipient of a reduction in or suspension of his or her monthly payments is not severe enough to warrant providing the recipient an oral hearing prior to recoupment; (3) to require such a hearing would result in vast disruption of the Social Security System; (4) in waiver consideration cases no property interest is involved invoking due process safeguards; and (5) no factual issues are presented in reconsideration cases necessitating oral pre-recoupment hearings.[12]

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[12] In a footnote, the Secretary postulates that since the plaintiffs in *Elliott* whose overpayments were determined by information other than that disclosed in annual earnings reports have as yet had their reconsideration and/or waiver claims acted upon by the Secretary (due to the district court's order prohibiting the Secretary from so acting), "the court's failure to await the Secretary's action on those written requests was plain error." Appellants' Brief in *Elliott,* at 17 n. 19. In other words, the Secretary contends that the district court failed to observe the requirement that administrative remedies must be exhausted as a requisite to the initiation of proceedings in a federal court.

However, the case here is to be distinguished from the normal situation in which federal jurisdiction is sought to be invoked to review administrative action. Most often, the courts are asked to scrutinize the merit of an administrative determination, and in that instance the available avenues of administrative review must ordinarily be exhausted. On the other hand, where, as here, the procedures which the agency contends must be exhausted are themselves the subject of attack, exhaustion is unnecessary. *Finnerty* v. *Cowen*, 508 F. 2d 979 (2d Cir. 1974); *Martinez* v. *Richardson, supra,* 472 F. 2d 1121; *Marsh* v. *County School Bd.*, 305 F. 2d 94 (4th Cir. 1962); *Francois* v. *Bushell*, 325 F. Supp. 531 (N.D. Cal. 1971).

In *Mattern* v. *Weinberger,* Civil No. 74–1776 (3d Cir. June 3, 1975) (slip opinion), all the arguments advanced here by the Secretary to distinguish the cases at bar from *Goldberg,* as well as the arguments propounded here by the Secretary in connection with the burden that requiring pre-recoupment oral hearings would impose on the Administration, were fully considered and for the most part rejected. This Court concurs with the Third Circuit's opinion and shares in its conclusion that *Goldberg* requires the Secretary to provide social security beneficiaries with a pre-recoupment oral evidentiary hearing along the parameters and with the qualifications outlined in the *Mattern* decision.

It cannot be seriously maintained that some form of process is not due social security beneficiaries whose old-age or disability payments are subject to suspension or reduction under the Secretary's recoupment procedures. Plaintiffs' interests in their monthly benefits amounts to a statutory entitlement and, therefore, constitutes a property interest protected under the Due Process Clause of the fifth amendment. *Goss* v. *Lopez,* 419 U.S. 565, 573 (1975) ; *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972) ; 42 U.S.C. § 401 et seq. Thus, they may be deprived of their property interests only by due process of law. *Id.* That the deprivation of such property interests does not subject the persons entitled thereto to a "severe detriment or grievous loss" is of no moment in determining whether due process comes into play.

"[F]or in determining 'whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.' [Citations omitted.] [T] length and consequent severity, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. [Citation omitted.] The Court's view has been that as long as a property deprivation is not *de minimis,* its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. [Citations omitted.]" *Roth* at 576 (emphasis original.)

A suspension or reduction in old-age or disability benefits imposed in order to recover an alleged overpayment is not a *de minimis* deprivation outside the protection of the due process clause. *See Goss, id.* (wherein the Court found a 10-day suspension from school not to be *de minimis*).

The Secretary contends that where a recipient admits that an overpayment has been made but seeks to gain a waiver of recoupment under 42 U.S.C. § 404 (b), the recipient has no property interest in the amounts overpaid deserving of due process protection. This argument is untenable. In *Board of Regents* v. *Roth, supra* at 577, the Supreme Court observed that, "the welfare recipients in *Goldberg* v. *Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so."

Thus, the social security beneficiaries here who concede they have been overpaid nonetheless possess a property interest in their right to demonstrate they are eligible for waiver under the terms of 42 U.S.C. § 404(b). Section 404(b) provides a recipient of an overpayment with a statutory right not to have his payments reduced or suspended if he is "without fault" and the recovery would "defeat the purpose" of the Act or "would be against equity and good conscience." It is not a matter of "governmental beneficence," as the Secretary puts it, in his waiving recoupment. Rather, it is a question of complying with the statute. Indeed, under section 404(b) waiver is not discretionary, but mandatory, viz., it provides that "there *shall* be no" recoupment under the conditions specified. "Thus, the fact that [plaintiffs] may not have been entitled to *receive* the overpayment[s] does not mean that [they have] no claim of entitlement to *retain* [them] (or at least to receive the full amount of [their] future monthly payments)." *Mattern* v. *Weinberger, supra* at 26. (emphasis original.)

More difficult, however, is determining the form of process to which plaintiffs are due. The Secretary contends that, except in the "most extraordinary" circumstances as epitomized by *Goldberg* v. *Kelly,* the Supreme Court has not required trial-type hearings prior to a deprivation of a property interest where, as here, the preliminary pre-deprivation procedures are sufficient to establish the "probable validity" of the administrative claim.

In *Mattern,* the Third Circuit voiced what we believe to be the crucial flaws in the Secretary's analysis.

"First, the Secretary relies primarily on a line of cases which, while having some relevance on the issue, did not purport to overrule or modify *Goldberg* and are not controlling here. *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974) ;

Fuentes v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Of these three decisions, only *Mitchell* indicated that 'probable validity' may be determined in the absence of a prior oral hearing; *Fuentes and Sniadach*, in fact, required prior oral hearings. Thus, *Mitchell*, rather than *Goldberg*, represents the exception to the rule. . . . In *Goldberg*, the Supreme Court considered a state welfare procedure in which a claimant had a right, after being interviewed by his caseworker and prior to termination of benefits, to receive a written explanation of the reasons for termination and to submit written information in rebuttal. He also had a right ot a full oral hearing *after* termination. 397 U.S. at 258–60. The Court, however, held that this procedure was insufficient and required an oral hearing prior to termination. Since the procedure invalidated in *Goldberg* would seem to be at least effective in ensuring 'probable validity' as the procedure used here, and since the Court in *Mitchell* did not purport to modify *Goldberg*, we refuse to extend the reasoning of *Mitchell* outside the creditor/debtor context and to permit *ex parte* determination of 'probable validity' in social welfare cases.

"Furthermore, even in *Mitchell's* 'probable validity' analysis were applicable to social welfare cases, the procedure here may not pass muster. . . . The Court upheld the Louisiana sequestration statute challenged in *Mitchell* partly because it provided for an immediate hearing after the writ issued. *Id.* at 618. Thus, the constitutionality of a procedure establishing 'probable validity' without a full oral hearing prior to the property deprivation may depend in part on whether there is an immediate right to an oral hearing afterward. *Mattern, supra* at 14–16." (emphasis original.)

As evidenced in the case of plaintiff Biner, however, attending review of the Administration's initial overpayment determination exists a delay of several months between the time recoupment commences and the time a recipient is provided a hearing.

"Finally, if the Secretary's prerecoupment procedures are to be upheld on the ground that they are sufficient to determine 'probable validity,' they would have to be effective in minimizing the risk of an erroneous determination. *See Mitchell, supra* at 618; *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), at 170 (Powell, J., concurring) and 188 (White, J., concurring in part and dissenting in part). However, the Secretary's own figures undercut his contention that the procedures at issue here are effective to minimize erroneous decisions to recoup. In 1970, the only year from which figures have been made available to us [as is also the case here], over one-third of all persons seeking a post-recoupment hearing (560 out of 1600) obtained reversals.

"Therefore, because of a combination of factors—the fact that the Supreme Court has given no indication that *Mitchell's ex parte* 'probable validity' approach is applicable outside the creditor/debtor context, and that such an approach appears to have been at least implicitly rejected in *Goldberg* v. *Kelly;* the substantial delay between the initiation of recoupment and an oral hearing; and the significant reversal rate following post-recoupment hearings—we conclude that the prerecoupment procedures cannot be defended on the ground that they are sufficient to establish the 'probable validity' of the determination in question. *Mattern, id.* at 16–17."

The Secretary also contends that oral hearings are not compelled here because unlike the welfare recipients in *Goldberg* whose benefits were terminated, social security beneficiaries whose monthly payments are suspended or reduced through recoupment procedures are not thereby necessarily left destitute. In the Secretary's view, the severity of the impact visited upon plaintiffs here is not of the same quantum as that involved in *Goldberg*, and therefore, the oral hearing required in *Goldberg* is here unnecessary. However, the line of precedent following the *Goldberg* decision does not support the Secretary's position.

It is axiomatic that the requisites of due process vary according to specific factual contexts. *Goldberg, supra* at 262–63. And it is true that of significant importance in determining the formality and procedural requisites of the process due in particular circumstances is the relative weight of the property interest involved. *Board of Regents* v. *Roth, supra* at 570; *Crow* v. *California Dept. of Human Resources Develop.*, 490 F. 2d 580 (9th Cir. 1973), *vacated* 95 S.Ct. 1110. That is not to say, however, that the relative weight of the interest involved is dispositive of the question whether an oral hearing is to be afforded in the first place. In its most recent pronouncements concerning the subject, it has become quite clear that the Supreme Court envisions due process to generally require a pre-deprivation hearing of some type as long as the interest at stake is not *de minimis*, irrespective of the severity of the impact resulting from that deprivation. *Goss* v. *Lopez, supra; North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Fuentes* v. *Shevin, supra* at 88–89; *Bell* v. *Burson*, 402 U.S. 535 (1971).[13]

The Government does not contend, nor can it be said, that the interest of these plaintiffs in receiving their monthly social security benefits is *de minimis*. As a threehold determination, therefore, it is our opinion that, excluding for the moment consideration of any competing interests on the part of the government, a hearing of some sort should be afforded plaintiffs prior to the recoupment of their social security old-age and disability benefits. Of similar resolve were the courts in *Mattern* v. *Weinberger, supra; Eldridge* v. *Weinberger*, 493 F. 2d 1230 (4th Cir. 1974), *aff'g* 361 F. Supp. 520 (W.D. Va. 1973), *cert. granted*, 43 U.S.L.W. 3383 (January 14, 1975); *Williams* v. *Weinberger*, 494 F. 2d 1191 (5th Cir. 1974), *aff'g* 360 F. Supp. 1349 (N.D. Ga. 1973).

As previously noted, due process is a flexible concept, and fashioning the specific parameters of the hearing required thereunder depends on striking an appropriate accommodation of the competing interests involved. *Goss, supra* at 579. The Secretary suggests that affirmance of the district courts' holdings that due process requires a full *Goldberg* type hearing prior to recoupment of overpayments made to social security beneficiaries would impose a heavy fiscal burden on the Department of HEW. Since the Department already provides overpaid reciipents elaborate post-recoupment procedures, including the opportunity for a *de novo* hearing, it appears that any burden in having to establish a new system, wherein the opportunity for a hearing must be provided before rather than after recoupment, will be minimal. The major fiscal difficulty envisioned by the Secretary is the likelihood that the availability of pre-recoupment hearings will result in the filing of a far greater number of requests for reconsideration or waiver.

During oral argument counsel for the Secretary cited statistics that show that the number of hearings on termination of welfare benefits has increased from 19,000 per year to 68,000 per year since the decision of the Supreme Court in *Goldberg*. Without further clarification, these statistics are of little value. They do not disclose what change, if any, has taken place in the success rate of welfare beneficiaries who receive a hearing. If the effect of *Goldberg* were to cause the filing of a large number of frivolous requests for hearings by people seeking to delay termination, there might be reason to question the wisdom of *Goldberg*. But if, in fact, the percentage of successful contests has remained constant or declined slightly, then *Goldberg* has resulted in a larger number of correct determinations of the issue of whether welfare benefits should be terminated, and, as such, *Goldberg* has benefited rather than burdened the system.

If requiring pre-recoupment hearings would result in the filing of frivolous requests in order to delay recoupment, the present procedure should also encourage frivolous written requests for reconsideration or waiver. This is so because the present practice of the Secretary is to delay recoupment until after a determination by the Department that the request should not be granted. But the statistics provided by the Secretary show a high rate of succes among those requesting either reconsideration or waiver. "Of those who do contest the initial overpayment determination, about sixty-nine per cent succeed in getting the Administration to reverse itself." *Elliott* v. *Weinberger*, 371 F. Supp. at 967. One may reasonably wonder what happened to the frivolous, delay-motivated requests for reconsideration or waiver?

As evidenced by plaintiff Biner's case, the present procedure involves a substantial delay anywhere from four to five months between the time a recipient requests an administrative *de novo* hearing upon his or her claim for waiver or reconsideration and the time the hearing is held and the matter is disposed of. Thus, a decision that hearings must be held prior to recoupment would mean that the government could not collect payments for several months after the initial determination that recoupment was necessary. However, the present system has the evil of denying benefits for an equally long time from beneficiaries who are successful, after a full hearing, in reversing the Secretary's initial determination. Which system is preferable should depend upon the success rate of recipients who take their case to the hearing stage. Relevant statistics indicate this rate to be very high—more than one-third of those recipients who avail themselves of the opportunity to have their grievances resolved at the *de novo* hearing succeed in persuading the Administration to reverse its original recoupment decision. *Elliott, supra* at 967. Since the success rate is significantly high, the government is being allowed to temporarily recoup payments when it has no claim to them. *See Fusari* v. *Steinberg*, 95 S. Ct. 533 (1975), in which the Supreme Court found "significant" in determining the requisites of due process a 19.4 to 26.1 percent reversal rate of appealed denials of unemployment compensation benefits. A system which delayed the start of recoupment pending the outcome of a hearing, the purpose of which is to determine the propriety of that recoupment, would provide a net benefit to society.[14]

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[13] We share the Third Circuit's view that Judge Friend's contrary holding in *Frost* v. *Weinberger*, 515 F. 2d 57 (2d Cir. 1975), is distinguishable and should not be followed.

As alluded to earlier, the Secretary draws a distinction between reconsideration cases and waiver consideration cases, contending that they raise somewhat different legal issues. Under the present procedures, when a recipient asks that the Secretary's overpayment determination be reconsidered, he is challenging the correctness of the overpayment determination itself. Contrariwise, when a social security beneficiary asks that recoupment be waived, he, in essence, is conceding that he was overpaid, but asks that recovery of the excess benefits involved be foregone.

The Secretary contends that in the vast majority of recoupment cases issues are presented which are uniquely suited to resolution by written submissions and documentary proof, thus obviating the need to provide full-blown, *Goldberg* type hearings. Although we agree that in those cases where factual disputes are as well suited to disposition by documentary proof and written submissions as by oral hearings, due process does no require a pre-recoupment oral hearing, we cannot divine, as does the Secretary, that in virtually all reconsideration and waiver cases the only issues raised are those adaptable to such facile resolution. The Third Circuit's analysis of those cases arising in the recoupment context in which such documentary disposition is permissible under due process principles is extremely well reasoned and warrants quotation here.

"Implicit in *Goldberg* v. *Kelly* is the recognition of the fact that issues likely to arise in welfare termination cases can only be resolved through an oral hearing. One of the plaintiffs was a woman whose benefits had been terminated because she allegedly failed to cooperate with welfare officials in suing her estranged husband. Another was a man whose benefits were terminated because he refused to accept drug counseling and rehabilitation, though he claimed that he did not in in fact use drugs in *Goldberg, supra* at 256 n. 2. It is obvious that resolution of those factual disputes could only be made at an oral hearing, where the trier of fact could evaluate the credibility of the claimant. As the Court noted, "where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269.

"Similarly, in *Goss* v. *Lopez, supra*, the question of whether a student had engaged in disruptive conduct justifying suspension could not possibly be determined without an oral hearing. See also *Bell* v. *Burson, supra*, which required an oral hearing to determine fault before revocation of a driver's license. By contrast, the Supreme Court in *Mitchell* held that no prior opportunity whatsoever need be given the debtor to oppose repossession of his property, in part because "the issue turns on the existence of the debt, the lien, and the delinquency," which "are ordinarily uncomplicated matters that lend themselves to documentary proof.." *Id.* at 609. Thus, "[t]he nature of the issues at stake minimize the risk" of an erroneous *ex parte* determination. *Id.* at 609–10 *Mattern, supra* at 23–24.

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"We agree with the Secretary that 'reconsideration' cases are generally well suited to resolution by documentary proof, and that claimants in most cases of this type are not constitutionally entitled to a prior oral hearing.[28]

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[14] In *Fusari* v. *Steinberg, supra*, the Court discussed the manner in which the delay in payment of unemployment insurance benefits pending a hearing affected the balancing required to determine the requirements of due process.

"In this context, the possible length of wrongful deprivation of unemployment benefits [between 100 and 126 days] is an important factor in assessing the impact of official action on the private interests [citations omitted.] Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process." 95 S. Ct. at 540.

Fusari appears to require that the existence of a substantial delay between the initial administrative determination and the conclusion of a full hearing be weighed as a factor tilting the scales toward providing a pre-recoupment hearing.

[28] We decline to establish a flat rule that *all* "reconsideration" cases may be decided prior to recoupment without an oral hearing, since we do not have sufficient basis for knowing all the types of cases which the Secretary may classify as being of the "recon-

"[As exemplified by the cases at bar] most of these diputes involve matters of a purely arithmetical nature—whether the computation of an earnings statement is correct; whether a computer's calculation of the amount of benefits received is accurate; whether two benefit checks have been received rather than one. In such circumstances, an examination of social security records and cancelled checks would seem to be sufficient, and it is hard to see how an oral hearing would be of much benefit to the claimant. Consequently, the Secretary's pre-recoupment procedures permitting written evidence and providing for an examination of written documents, when coupled with a right to a *post*-recoupment oral hearing satisfy due process.

"We add one *caveat*, however. Because we cannot envision all the situations in which 'reconsideration' cases are likely to arise, we acknowledge the possibility that there may be cases where the opportunity to appear in person might be important in making an accurate determination. Thus, while many 'reconsideration' cases can be decided without a prior oral hearing, we believe that, as a matter of due process, the Secretary should establish procedures which would provide for an oral hearing where a case does not hinge on documentary evidence and where a claimant raises issues which necessitate an evaluation of his credibility. We are mindful of the concern expressed in *Goldberg* that many claimants lack the education or ability to frame written submissions in a persuasive light, and thus if a claimant in a 'reconsideration' case *raises* such an issue, he should be entitled to a hearing.

"If, however, a claimant merely denies receiving duplicate checks or claims that his earnings were of a certain amount, cancelled checks bearing his endorsement or earnings records maintained by the social security office would seem to constitute hard proof incapable of oral rebuttal. *Mattern*, *supra* at 24–25."

If plaintiff Biner had simply denied receiving the checks here in dispute or had claimed that they did not represent an overpayment, she would not have been constitutionally entitled to a hearing prior to recoupment. Cancelled checks bearing her endorsement would have been persuasive proof that she had received and negotiated them, and a comparison of the salary listed in her earnings report with the statutory maximum—showing the former to exceed the latter—would be strong evidence that the checks represented an overpayment. "Furthermore [plaintiff Biner] came forth with no written evidence to support a contention that she had not in fact been paid [$2,216.20] or that the check[s] did not represent an overpayment." *Id.* at 25–26. In her two requests for reconsideration, she simply stated that "I do not believe there was any overpayment." ***Buffington*** Tr. 112, 113.

"Consequently, if she had made solely those contentions, it is hard to see how a pre-recoupment oral hearing would be helpful. In all cases, however, a claimant should be informed, prior to initiation of recoupment, of the basis on which an adverse determination is made and should be offered the opportunity to explain or rebut any written evidence against her.[15]

* * * * * * *

"The Secretary also contends that 'waiver' cases, like 'reconsideration' cases, lend themselves to resolution by documentary proof. We disagree. One of the factors to be considered in a 'waiver' case is whether the claimant is 'without fault,' and the Supreme Court has clearly indicated that determinations as to fault must be made at an oral hearing." *Mattern*, *supra* at 26–27.

As in *Mattern*, the 'facts of [plaintiff Biner's case] graphically illustrate the need for an oral hearing." *Id.* While conceding that it may have been at fault in iissuing Mrs. Biner the checks which represented overpayments for the year of 1972, the Administration nonetheless believed that the letter enclosed with the first check sent to Biner and the fact that she received checks while she was employed put her on notice that continued retention of those checks was improper and precluded a finding on its part that she was without fault" within the meaning of the Social Security Act. ***Buffington*** Tr. 212–13. However, whether

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sideration" type. The crucial distinction is not whether the cases are labeled "reconsideration" or "waiver," but whether they lend themselves to resolution by documentary proof. Thus while we shall use those terms as suggested by the Secretary for purposes of convenience, we do not mean to imply that the constitutionality of recoupment in a particular case is dependent upon the label used nor that we necessarily accept the Secretary's categorizations *in toto*.

[15] Like the district court in ***Elliott*** we have serious doubts as to the adequacy of the Secretary's summary explanation of some of its overpayment determinations as the result of "processing error." ***Elliott*** Tr. 285. The strictures of due process would seem to compel a more elaborate description of the type of error which gave rise to the Secretary's determination in the first instance.

Biner knew that she was not entitled to these checks seems to be a matter difficult to resolve without hearing her side of the story. Similarly, a finding of fault could not rest on the ambiguous [letter included with the first overpayment check sent to Biner] at least without giving [her] an opportunity to explain in person what she thought it meant." *Id.* at 27.

"Another requirement that a claimant in a waiver case must meet is that recoupment would either frustrate the purposes of the Act or be against equity and good conscience. As defined by the Secretary's regulations, these terms refer to such matters as difficulty in meeting necessary living expenses or a change of position by the recipient. [20 C.F.R. §§ 404.508, 404.509] We do not see how a resolution of such questions can reliably be determined in the absence of oral testimony.

"While we believe that claimants in 'waiver' cases have a constitutional right to a pre-recoupment oral hearing, that right may not attach in all cases. Where a claimant in a 'waiver' case raises no disputed issue of fact, or where, accepting his version of the facts as true, we cou'd say as a matter of law that he was not entitled to retain the overpayment, then again it is hard to see how a pre-recoupment hearing would be of benefit. Thus, the constitutional requirement of a hearing may be limited to some extent by principles analogous to summary judgment in civil litigation." *See Mills* v. *Richardson*, 464 F. 2d 995, 1001 (2d Cir. 1972). *Id.* at 27–28.

* * * * * * *

"In sum, we conclude that the recoupment procedure established by the Secretary is constitutionally deficient in that it does not provide for pre-recoupment oral hearings in the situations we have indicated are necessary. We do not believe that due process requires pre-recoupment oral hearings in all cases, but the Secretary's existing procedure makes no distinction between the various types of cases and issues that are likely to arise. To the extent that a hearing is required, we agree with the district court[s] that the full panoply of procedural safeguards need not be provided and that the pre-recoupment hearing need not take the form of a judicial or quasi-judicial trial." *Id.* at 28–29.

We are therefore of the opinion that to the extent indicated below the specific requirements outlined in the lower courts' opinions are those which are compelled by the Due Process Clause of the fifth amendment. Specifically, the Secretary is required to provide a pre-recoupment hearing in the situations noted previously which affords the complainant the following rights:

1. to present his case orally and to submit evidence with witnesses or documents;
2. to cross-examine witnesses against him;
3. to be represented by counsel if he wishes or to retain the informal assistance of a friend;
4. to have an independent hearing officer preside during the hearing who is totally uninvolved with the initial overpayment and recoupment decisions;
5. to receive an opinion written by the hearing officer which sets forth his decision and the reasons and evidence in support of it;
6. to review his file five days before the hearing;
7. to receive adequate notice at least thirty days prior to the commencement to recoupment: (1) explaining the reasons recoupment is sought; (2) apprising him that in the event he, in writing, requests reconsideration or waiver of the Secretary's initial overpayment and recoupment determination, the Administration will subsequently inform him of the form of review to which he is entitled pursuant to the opinion herein rendered; and (3) informing him that recoupment will not begin until his request has been finally disposed of by way of the required review procedure.[16]

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[16] The court in *Elliott* found the Secretary's form of notice deficient insofar as it failed to apprise receipts of the appropriate forms which must be completed in order to invoke the Administration's review procedures. To remedy the situation, the court ordered the Secretary to specify in his initial overpayment notice those forms the recipient must request from the local office to perfect his appeal rights. Although any written submission will trigger commencement of the Administration's reconsideration and/or waiver procedures, given the writing capabilities of many of these old-age and disabled beneficiaries and the subtleties which may inhere in determining whether an oral hearing is required in any given situation, it would be prudent of the Secretary to furnish recipients information as to the forms involved in cases of this sort and encourage their utilization. We do not hold that providing information as to such forms is a matter of constitutional imperative, however.

It is to be noted that any recipient who fails to notify the local office of his desire to have his overpayment and recoupment determination reviewed within the thirty day period will be deemed to have waived his right to seek that review by way of written submissions or by way of an oral hearing.

The judgments of the district courts are affirmed in part and reversed in part, and the cases are remanded for the entry of new judgments consistent with this opinion.

EMIL E. MELEI, Jr.,
Clerk.

Mr. RHINELANDER. We have also made available briefs filed in other cases, and I think they contain a good deal of information which may be of help to the committee.

Mr. BURKE. We will have the Administration's brief and the respondent's brief in the *Eldridge* case inserted in the record.

[The briefs follow:]

No. 74-204

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR WEINBERGER, SECRETARY OF HEALTH,
EDUCATION AND WELFARE, PETITIONER
v.
GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-204

CASPAR WEINBERGER, SECRETARY OF HEALTH,
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v.
GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-2A) is reported at 493 F. 2d 1230. The opinion and order of the district court (Pet. App. 3A-18A) are reported at 361 F. Supp. 520.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1974. The petition for a writ of certiorari was filed on August 29, 1974,[1] and was granted on

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[1] On July 1, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 29, 1974.

January 13, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the administrative procedures governing the termination of Social Security disability benefit payments, under which, prior to termination, a beneficiary is given a summary of the evidentiary basis for the proposed termination and an opportunity to submit additional evidence and a written rebuttal, but not an oral hearing, are constitutional.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Sections 221 (a), (c) and (d), 223(a)(1), and Section 225 of the Social Security Act, as amended, 70 Stat. 815–818, 42 U.S.C. 421 (a), (c) and (d), 423(a)(1), and 425, provide in pertinent part:

> Section 421. (a) * * * In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall, except as provided in subsection (g) of this section, be made by a State agency pursuant to an agreement entered into under subsection (b) of this section. Except as provided in subsections (c) and (d) of this section, any

such determination shall be the determination of the Secretary for purposes of this subchapter.

*   *   *   *   *

(c) * * * The Secretary may on his own motion review a determination, made by a State agency pursuant to an agreement under this section, that an individual is under a disability (as defined in section 416(i) or 423(d) of this title) and, as a result of such review, may determine that such individual is not under a disability (as so defined) or that such disability began on a day later than that determined by such agency, or that such disability ceased on a day earlier than that determined by such agency.

(d) * * * Any individual dissatisfied with any determination under subsection (a), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

Section 423. (a) * * * (1) Every individual who—

(A) is insured for disability insurance benefits (as determined under subsection (c)(1) of this section),

(B) has not attained the age of sixty-five,

(C) has filed application for disability insurance benefits, and

(D) is under a disability (as defined in subsection (d) of this section)

shall be entitled to a disability benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to such insurance benefits which terminated, or had a period of disability (as defined section 416(i) of this title) which ceased, within the 60-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains age 65, or the third month following the month in which his disability ceases. * * *

* * * * *

Section 425. * * * If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to benefits under section 423 of this title, or that a child who has attained the age of eighteen and is entitled to benefits under section 402(d) of this title, or that a widow or surviving divorced wife who has not attained age 60 and is entitled to benefits under section 402(e) of this title, or that a widower who has not attained age 62 and is entitled to benefits under section 402(f) of this title, may have ceased to be under a disability, the Secretary may suspend the payment of benefits under such section 402(d), 402(e), 402(f) or 423 of this title until it is determined (as provided in section 421 of this title) whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased. In the case of any individual whose disability is subject to deter-

> mination under an agreement with a State under section 421(b) of this title, the Secretary shall promptly notify the appropriate State of his action under this section and shall request a prompt determination of whether such individual's disability has ceased. * * *

The pertinent regulations of the Department of Health, Education and Welfare are contained in 20 C.F.R. 404.905, *et seq.*, and 20 C.F.R. 404.1501, *et seq.* Relevant portions of the Disability Insurance State Manual are reproduced as Appendix C to the petition (Pet. App. 19A–75A), and relevant portions of the Social Security Claims Manual are reproduced as Appendix B to this brief, *infra,* pp. 19A–61A.

STATEMENT

Under the disability insurance benefits program established by Section 223(a)(1) of the Social Security Act, as amended, 70 Stat. 815, 42 U.S.C. 423(a)(1), a worker is entitled to receive disability benefits only for the period during which he is disabled. Upon a determination that the disability has ceased, the Secretary must terminate the payment of benefits, effective the third month after the month of cessation of disability.

1. Respondent, a resident of Virginia, applied for disability benefits under the Social Security Act, which were awarded by the Secretary, acting through the Social Security Administration, effective in June 1968 (A. 11).[2] Respondent was informed that his claim would be reexamined due to the possibility

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[2] Following an initial denial of his claim and affirmance after reconsideration, respondent was awarded benefits by decision of a hearing examiner (now administrative law judge) (A. 11).

of his medical recovery, and that his benefits would be terminated if the review demonstrated that he was no longer disabled (A. 11).[3]

The Virginia state agency scheduled respondent's case for review in 1972 and in March 1972 sent him a questionnaire (A. 12). The letter requested respondent to complete and return the questionnaire within ten days, and also informed him that if he required assistance or had any questions he could visit or telephone any Social Security office (A. 12).[4]

Respondent completed the questionnaire, stating that he had not improved and listing his treating physician (A. 12). The state agency obtained a medical report from the latter and also obtained the report of a psychiatric consultant based on his examination of respondent (A. 12).

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[3] Following a medical investigation and review of respondent's file, the Virginia state agency decided in February 1970 that his disability had ceased as of January 1970, and the Secretary suspended his benefits (A. 11) under since-abandoned procedures for the suspension of benefits prior to affording a claimant an opportunity to submit rebutting evidence. Compare *Richardson* v. *Wright*, 405 U.S. 208. In addition to pursuing his administrative remedies, respondent instituted litigation in the district court seeking to defer the suspension of benefits pending an administrative hearing (A. 11). On June 26, 1970, the district court ordered payments to be continued pending final resolution of the case on the merits (A. 11). The case was finally dismissed as moot on May 6, 1971, when the hearing examiner determined that respondent's disability had not ceased (A. 11).

[4] The state agencies responsible for administering this phase of the disability program typically operate through a single office in the state capital, but the more numerous local Social Security district offices can provide information and assistance to claimants and beneficiaries (see pp. App. A, *infra*, p. 15A, n. 33).

After considering the file, the state agency wrote respondent that, based upon the evidence, it had made a proposed determination that his disability had ceased in May 1972 (A. 12–13). The letter included a statement of reasons (*ibid.*).[5]

The state agency asked respondent to furnish within ten days any further evidence relating to the reasons it gave or to request further time to obtain such evidence (A. 13). In response, he disputed one characterization of his claim made in the state agency's statement of reasons[6] and stated that the agency already had "enough evidence" in the file upon which to base a decision (A. 13).

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[5] The letter stated (A. 12–13; emphasis supplied):

"We previously informed you that we were asked by the Social Security Administration to help determine whether your impairment still prevents you from working. Although you indicate on the report you recently completed for us that you do not feel your condition has improved so that you are able to return to work, the other information and evidence in your case shows that you are able to work, and have been since May, 1972.

"You were initially found to be disabled due to chronic anxiety and back strain. In addition you have been found to have diabetes. Medical evidence shows no significant motion limitation of your back which would impose severe functional restrictions. Diabetes is under control and no complications have been noted, secondary to this. Although you remain somewhat anxious, there is no indications [sic] of continued emotional problems of sufficient severity to preclude all work for which you are qualified.

"Therefore, disability benefits being paid on your social security number may be stopped unless additional evidence is submitted which shows that you are still unable to work because of your impairment.

"*If you have additional information you want us to consider, please let us know immediately, using the enclosed envelope; a reasonable additional amount of time will be granted where necessary for you to obtain and submit additional evidence.* If we do not hear from you within ten days, we will forward your records to the Social Security Administration and when a formal decision is made you will be notified.

"Under the Social Security Law, benefits may be paid for a three-month period of adjustment. This period includes the month in which you have a regained ability to work and two additional months.

Upon the basis of this information, the state agency determined that respondent had ceased to be disabled in May 1972 and forwarded that determination to the Social Security Administration, which accepted that conclusion and on June 12, 1972, determined that payments of benefits to respondent should cease, effective in July 1972 (A. 14), after the two-month statutory grace period (see p. 16, *infra*). Social Security notified respondent in writing of this determination and of his right to request reconsideration within six months (A. 14).

Respondent did not seek reconsideration. Rather, on August 3, 1972, he filed his complaint in this case seeking a declaration that the administrative procedures established by the Secretary for determining whether there was a continuing disability were unconstitutional, and an injunction requiring the Secretary to continue paying respondent benefits until he is afforded an oral evidentiary hearing concerning the cessation of his disability (A. 1–3). The Secretary moved to dismiss on the ground that respondent's benefits had been terminated pursuant to lawful regulations that do not violate due process (A. 3–4), and on February 13, 1973, the district court ordered respondent's benefits reinstated pending its final disposition on the merits (A. 15–16).

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[6] Respondent claimed that he had arthritis of the spine rather than a strained back (A. 13).

On April 6, 1973, the district court held that the administrative procedures pursuant to which the Secretary terminated respondent's benefits were unconstitutional (Pet. App. 6A–18A). The court noted that since respondent did not contend that the Secretary had failed to comply with the applicable procedures the only issue was whether those procedures satisfy due process. The court ruled that respondent's interest in continued receipt of Social Security disability benefits is indistinguishable from the state welfare beneficiary's interest involved in *Goldberg* v. *Kelly,* 397 U.S. 254, and *Wheeler* v. *Montgomery,* 397 U.S. 280 (Pet. App. 8A–10A), and that, because disability determinations may involve subjective judgments in resolving conflicting medical evidence and are not exclusively based upon "objective" medical evidence, a due process standard different from that required by *Goldberg* v. *Kelly, supra,* for termination of welfare benefits is not justified for termination of Social Security disability benefits (Pet. App. 10A–13A).

The court rejected the Secretary's contentions that the protections against possibly erroneous decisions contained in the procedures complied with minimum standards of due process when viewed in the context of the administrative burden and immense costs that would result if the Secretary were required to provide an oral evidentiary hearing prior to the termination of benefits (*id.* at 12A–17A).

The court remanded the case to the Secretary for the payment of disability benefits and for further proceedings not inconsistent with the court's opinion (*id.* at 18A).[7]

The court of appeals affirmed on the opinion of the district court (*id.* at 2A).

SUMMARY OF ARGUMENT

1. Respondent's Social Security disability insurance benefit payments were terminated by the Secretary pursuant to procedures evolved to cope with the enormous burdens presented in administering a multibillion dollar program in the context of a cooperative federal-state institutional structure. Those procedures are fair and satisfy due process requirements.

Before his benefits were terminated, respondent was given the opportunity to submit evidence demonstrating his continuing disability, and he did so. After the state agency involved in administering the disability program tentatively determined that he was no longer disabled, respondent was told the basis for that conclusion and was given a further opportunity to submit evidence. Though many take advantage of that opportunity, with favorable results, respondent declined to do so, saying that the state agency already had "enough evidence."

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[7] The court's order continued the reinstatement of respondent's benefits. At current levels he is entitled to receive benefits of $163.60 per month. As a result of his disability, he is also entitled to receive both hospital and supplementary medical insurance under the Social Security Act, 42 U.S.C. 1395, *et seq.*, in which case a monthly premium of $6.30 would be deducted from his monthly benefits, so that his net monthly benefit would be $157.30. Respondent's children would also be entitled to receive, as his auxiliary beneficiaries, a monthly benefit totalling $151.00 as a result of his disability, pursuant to 42 U.S.C. 402(d)(1).

After the state agency, with the concurrence of the Secretary, made its "initial determination" that respondent was no longer disabled, respondent did not seek reconsideration or request an evidentiary hearing, although many beneficiaries, taking advantage of the continuing right to submit additional evidence and to obtain *de novo* review, successfully seek both.

The courts below held that those procedures unconstitutionally deprived respondent of property without due process because prior to termination of disability insurance benefits respondent had no opportunity to appear personally or confront and cross-examine the witnesses who provided the evidence upon which the termination decision was based. The courts thus extended to the termination of Social Security disability payments the procedures that this Court in *Goldberg* v. *Kelly,* 397 U.S. 254, required for termination of welfare benefits. The two situations are sufficiently different, however, to justify different procedures.

2. This Court has held that, in determining what procedures for denying or terminating statutory benefits satisfy due process, the competing interests must be accommodated. Those interests are: the worker's interest in continued receipt of disability insurance benefits assessed in light of the reliability of the existing procedures, and the government's interest in avoiding unneeded administrative burdens and costs that would deplete the ability of the disability insur-

ance trust fund to pay out the maximum proportion of its revenues as benefits to eligible workers.

A. Unlike the welfare recipients involved in *Goldberg* v. *Kelly,* the entitlement of disabled workers to Social Security benefits is unrelated to need. While many disabled workers may well rely heavily on them, such benefits are not, by definition, the last line of defense against poverty. Disabled workers may have income from a variety of public and private programs or other assets; other members of their families may be employed; and welfare and other programs may be available in case they are truly needy. Thus, disability benefits do not share the unique nature of welfare benefits that underlay the Court's decision in *Goldberg* v. *Kelly.*

B. The existing procedures provide a fair method for determining whether disability has ceased. Their reliability is not undermined by the lack of personal appearance and cross-examination before benefits are terminated. Only fifteen percent of all initial determinations that disability has ceased are ultimately reversed as a result of further administrative proceedings or on judicial review. In many of these cases, moreover, the different result reflects merely different judgments made in the subsequent *de novo* administrative review, or the submission of new evidence.

Disputed terminations of benefits typically involve, as here, a determination of medical recovery. Such determinations are based largely upon medical reports by the worker's own doctor and by other doctors. Such evidence is "uniformly recognized" to be reliable

(*Richardson* v. *Perales,* 402 U.S. 389, 405), and with evidence of that character, where veracity and memory are rarely in issue, cross-examination is of limited value. That the right to appear in person is not critical is indicated by the fact that on reconsideration, where there is no personal appearance, the decision is often favorable to the worker. In any event, even a high "reversal" rate does not imply that the existing procedures for making the initial determinations lack fundamental fairness.

C. The requirement of a pre-termination evidentiary hearing would entail enormous administrative burdens and expense, without compensating improvement of the reliability of the existing procedures. It is estimated that an additional 11,000 hearings annually would be required in disability termination cases. Under the Social Security Act, determinations of disability must be made by the state agency in cases of medical recovery. Those agencies, however, are centrally located, usually in a single office, are already overburdened with work on this and other programs, and are not staffed by personnel who are trained or necessarily qualified to conduct evidentiary hearings.

The Social Security Administration's Bureau of Hearings and Appeals would not be able effectively to handle this large additional number of hearings. That Bureau now conducts hearings under all Social Security programs, as well as under new related programs for the needy disabled and for miners with "black lung" disease. Despite expansion of the Bureau, it is falling further behind in coping with its enormous and unavoidable existing caseload, so that there is currently at least a ten-month delay between hearing requests and decisions. Conducting an additional 11,000 hearings would mean either that many claimants under other programs would face further delays in receiving benefits to which they may be entitled, or that many workers no longer entitled to disability benefits would unjustifiably continue to receive benefits while awaiting a hearing.

The costs of such a pre-termination hearing requirement, moreover, would be substantial—as much as $25,000,000 annually. Such an expense could impair the already-precarious actuarial soundness of the disability insurance trust fund, perhaps thereby depriving eligible workers of benefits to which they might otherwise be entitled.

ARGUMENT

THE CURRENT PROCEDURES FOR TERMINATION OF SOCIAL SECURITY DISABILITY INSURANCE BENEFITS PROVIDE DUE PROCESS TO BENEFICIARIES

I. INTRODUCTION: THE PROCEDURES CURRENTLY FOLLOWED IN TERMINATING SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

A recent comprehensive study of the federal disability insurance program concluded that the Social Security disability program, which this Court has termed "a comprehensive complex administrative program" (*Richardson* v. *Wright,* 405 U.S. 208, 209), "has always been the most complex of the Federal cash benefit programs to administer." Staff of the House Committee on Ways and Means, 93d Cong., 2d Sess., *Report on the Disability Insurance Program* 7 ("*Staff Report*"). We begin, therefore, by describing the pertinent features of that program as established by Congress and implemented by the Secretary.

A. THE NATURE OF THE BENEFITS AND THE DISABLED WORKER'S ENTITLEMENT TO THEM

In 1950 Congress established a program of federal assistance, supported by general revenues, to states that provided public assistance to needy persons who were, *inter alia,* permanently and totally disabled. 64 Stat. 555.[8] In order to provide benefits for disabled workers who were not necessarily needy (see H. Rep. No. 1189, 84th Cong., 1st Sess., p. 4),[9] Congress established, in the 1956 amendments to Title II of the Social Security Act, a new program of disability insurance for workers. 70 Stat. 815.[10]

Financed by revenues from employers' and employees' payroll taxes paid into a separate disability insurance trust fund (26 U.S.C. 3101(a), 3111(a); 42 U.S.C.

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[8] This program has recently been replaced with the Supplemental Security Income program, discussed below (see pp. 22–24, *infra*), involving direct federal aid to the needy disabled, among others. 42 U.S.C. (Supp. III) 1381, *et seq.*

[9] The program was described in the legislative history as a first line of defense, public assistance being the second (102 Cong. Rec. 13038 (remarks of Senator George)), in order that disabled workers not be required "to become destitute before they receive earned benefits." 102 Cong. Rec. 13022 (remarks of Senator Jackson).

[10] The Amendments also established a program of benefits for disabled widows and widowers (42 U.S.C. 402(e)(1)(B)) and disabled children (42 U.S.C. 402(d)(1)(B)) of deceased workers. These benefits are administered through essentially the same procedures as those governing the disability program for disabled workers, and we do not discuss them separately.

401(b)), the program provides monthly benefits for a disabled person who has worked sufficiently to have an insured status (42 U.S.C. 423(c)(1)) and who has had substantial work experience in a specified period preceding the onset of disability.[11] If a worker qualifies for disability benefits, the program also provides benefits to the worker's dependents under specified circumstances, particularly involving the age of the auxiliary beneficiary. 42 U.S.C. 402 (b), (c), (d).[12] In addition, at age 65 a disabled worker's benefits are automatically converted to retirement benefits (42 U.S.C. 416(i)(2)(D), 423(a)(1)), payable regardless of whether the worker thereafter remains disabled. Prior to age 65, however, the worker is entitled to disability benefits only so long as his or her disability continues, and, ordinarily, for the two months following the month in which the disability ceased. 42 U.S.C. (Supp. III) 423(a).

Thus, to establish initial and continued entitlement to benefits, the Act requires the worker to prove "disability" within the meaning of the Act by furnishing "such medical and other evidence of the existence thereof as the Secretary may require." 42 U.S.C. 423 (d)(5). In carrying this burden, the worker must demonstrate that he or she is unable

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[11] A disabled worker older than 30 (as most are) must have at least 20 quarters of covered employment in the 40 quarters preceding the disability; less stringent requirements apply to younger workers. 42 U.S.C. 423(c)(1).

[12] Children of a disabled worker are ordinarily entitled to benefits until they reach age 18, or age 22 if they pursue higher education. 42 U.S.C. 402(d)(1). A worker's spouse is also entitled to benefits under certain conditions. 42 U.S.C. 402(b), (c). For convenience, however, we shall use "worker" and "beneficiary" to refer to all categories of beneficiaries~~, and~~ unless otherwise indicated.

> to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *. [42 U.S.C. 423(d)(1)(A).]

In satisfying this test, the worker must demonstrate, by means of "medically acceptable clinical and laboratory diagnostic techniques" (42 U.S.C. 423(d)(3)), that he or she has a physical or mental impairment, as defined in the Act (42 U.S.C. 423(d)(3)), that is of such severity that

> he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. [42 U.S.C. 423(d)(2)(A).][13]

Unlike some disability programs (see *Staff Report* 6), the Social Security disability insurance program does not recognize degrees of disability; at any given time a worker either is or is not "disabled," and the amount of the benefits is not related to the nature or extent of the disability.[14] Entitlement to benefits is also unrelated to the worker's need or to the amount of the worker's income or support from most other sources, such as employment of other members of the family, the worker's own limited or occasional employment,[15] savings, investments, or tort claim awards, or the "many other important programs both public and private, which contain provisions for disability payments affecting a substantial portion of the work force * * *" (*Richardson* v. *Belcher,* 404 U.S. 78, 85–87 (Douglas, J., dissenting)), *e.g.,* workmen's compensation awards,[16] private insurance, public or private pensions, veterans benefits, food stamps, or public assistance. See *Staff Report* 9–10, 419–429; cf. Dixon, *Social Security Disability and Mass Justice: A Problem in Welfare Adjudication* 90–91 (1973). Even if otherwise qualified, moreover, a disabled worker is ordinarily not entitled to receive benefits until having been disabled for five months. 42 U.S.C. (Supp. III) 423(c).

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[13] There is a different definition of disability for eligible widows and widowers. See 42 U.S.C. 423(d)(2)(B). The Secretary's regulations concerning disability are set forth at 20 C.F.R. 404.1501–404.1539.

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[14] The level of benefits is determined by the worker's average monthly wage, age, and other factors specified in 42 U.S.C. (Supp. III) 415. See 42 U.S.C. (Supp. III) 423(a)(2).

[15] In 1970, about ten percent of disabled workers receiving disability benefits reported earnings from employment. *Staff Report* 390–395. Of course, in a period other than a trial work period (see p. 25, *infra*), earnings exceeding a level established by the Secretary (see 20 C.F.R. 404.1534) could lead to a determination that the worker was engaged in "substantial gainful activity" and hence no longer entitled to benefits (see p. 25, *infra*).

[16] Workmen's compensation benefits, however, are deducted in part in accordance with a statutory formula. 42 U.S.C. (Supp. III), 424a; 20 C.F.R. 404.408; see *Richardson* v. *Belcher*, 404 U.S. 78.

Because the program is not limited to the permanently disabled. Congress has from the outset stressed rehabilitation as a purpose. Thus, it is the declared policy of Congress that disabled workers seeking benefits be referred to state vocational rehabilitation agencies (42 U.S.C. 422(a)), and a worker's refusal to accept rehabilitation services may be a ground for reducing or withholding benefits. 42 U.S.C. (Supp. III) 422(b); see 20 C.F.R. 404.422.

In sum, the benefits are conditional in nature, and a beneficiary is entitled to them only so long as the conditions of entitlement are satisfied.

B. THE INSTITUTIONAL SETTING OF THE TERMINATION PROCESS

The Social Security disability insurance program is administered through an unusual combination of federal and state agencies performing interrelated functions specified by the Act and the regulations. As we have noted, Congress intended that the disability program be coordinated with state vocational rehabilitation programs, to provide disabled workers a means of adjusting their employment prospects to their impaired abilities (see pp. 18–19, *supra*). In an effort to implement this purpose, Congress required that state vocational rehabilitation agencies be given the opportunity to play a significant role in the administration of the Social Security disability program.

The Act provides that the determinations whether a person is under a disability, when it began, and when it ceased shall be made by the state agency administering a plan approved under the Vocational Rehabilitation Act, 41 Stat. 735, as amended, 29 U.S.C. (Supp. III 701, *ei seq.*, or by another appropriate agency, pursuant to an agreement entered into with the Secretary.[17] That determination is "the determination of the Secretary for purposes of this [program] * * *." 42 U.S.C. 421(a).[18]

The standards to be applied and the procedures followed by a state agency are prescribed by the Secretary through the uniform state agency agreements (see 42 U.S.C. 421(b)),[19] supplemented by a Disability Insurance State Manual ("DISM") (see, *e.g.*, Pet. App. 19A–75A), and the state agency's costs of administration are paid out of the federal trust fund.

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[17] The use of state agencies to make determinations of disability for federal purposes was initiated in the Social Security Amendments of 1954, 68 Stat. 1080, as amended, 42 U.S.C. 416(*i*), which established a "freeze" on a disabled worker's insured status and benefit amount for purposes of the basic old age and survivors insurance program. See *Staff Report* 110–112. This use of state agencies was intended to "serve the dual purpose of encouraging rehabilitation contacts by disabled persons and would offer the advantages of the medical and vocational case development undertaken routinely by the rehabilitation agencies. These agencies have well-established relationships with the medical profession and would remove the major load of case development from the Department." H. Rept. No. 1698, 83d Cong., 2d Sess., pp. 23–24.

[18] The Act authorizes the Secretary to make the determination concerning disability if a state declines to enter into such an agreement (42 U.S.C. 421(g)), but, while not required to, all states have done so. *Staff Report* 148.

[19] A model agreement is set forth at *Staff Report* 178–187.

42 U.S.C. 421(e).[20] In most cases the state's vocational rehabilitation agency acts as the "state agency" for purposes of the Social Security disability insurance program (*Staff Report* 148), typically operating through a centralized office serving the entire state (A. 18).[21]

The Act authorizes the Secretary to review on his own motion a state agency's determination that a person is disabled (but not a determination that the person is not disabled) and permits the Secretary to determine that the person is not disabled, or that the disability began later or ceased sooner than determined by the state agency. 42 U.S.C. 421(c). Thus, at this stage the Secretary may only make a determination concerning a worker's disability that is less, but not more, favorable to the worker than that made by the state agency. Congress provided this one-sided revision authority with the expectation that the Secretary would use it "in order to assure uniform administration of the disability benefits and to protect the Federal Disability Insurance Trust Fund from unwarranted costs." H. Rept. No. 2936, 84th Cong., 2d Sess., p. 26.

The Secretary has delegated his responsibilities and powers under the Act to the Social Security Administration ("SSA"). See 40 Fed. Reg. 4473, amending 33 Fed. Reg. 5828. The disability insurance benefits program is handled principally by SSA's Bureau of Disability Insurance, headquartered in Baltimore,[22] hearings and appeals are handled by SSA's Bureau of Hearings and Appeals. Cf. 20 C.F.R. 422.201, *et seq.*[23] In addition, as we discuss below in more detail (see App. A, *infra,* pp. 14A–16A), local SSA district offices also play a role in administering the disability insurance program. SSA employees implement the Act pursuant to a Claims Manual ("CM") (*e.g.,* App. B, *infra,* pp. 19A–61A).

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[20] The federal government also bears the state agency's costs of rehabilitating certain disabled workers. 42 U.S.C. (Supp. III) 422(d).

[21] The state agency in Virginia, the Disability Determination Section of the Department of Vocational Rehabilitation, has two offices for this purpose, in Richmond and Norfolk.

In considering the institutional setting, two programs similar to the Social Security disability insurance program should be mentioned briefly, although the procedures followed in those programs differ from those followed under the disability program in issue here. In 1972 Congress enacted the Supplemental Security Income ("SSI") program for the needy aged, blind or disabled, 86 Stat. 1465, 42 U.S.C. (Supp. III) 1381, *et seq.,* which replaced the program of federally-aided state assistance to the needy disabled established in 1950 (see p. 15, *supra*) with title XVI of the Social Security Act. The new program provides direct federal aid to needy persons who are aged, blind or "disabled," defined in the same manner as in the Title II Social Security disability insurance program. See 42 U.S.C. (Supp. III) 1382c(a)(3).

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[22] The Bureau has approximately 6,000 employees at headquarters (*Staff Report* 134), who are also responsible for other programs.

[23] At the end of fiscal 1974, 482 administrative law judges were authorized to serve in SSA's 118 hearing offices throughout the country (*Staff Report* 140), but they are responsible for hearings under a variety of other programs.

In addition, a "grandfather" clause in the SSI program automatically extended such benefits to persons who were already receiving benefits under existing state programs for the needy aged, blind or disabled (which all states, including Virginia,[24] had adopted) so long as they continue to meet the state standards, even if such persons would not be regarded as disabled under federal standards. 42 U.S.C. (Supp. III) 1382c (a)(3)(E). According to SSA, about 3 million people became entitled to SSI benefits under the grandfather clause, in addition to about 1.25 million under the federal SSI standards.

A person may receive disability benefits under both Title II (involved here) and SSI, and as of November 1974 about 480,000 of the 1.5 million receiving SSI benefits as being disabled were also receiving Social Security disability benefits, although the amount of SSI benefits would be reduced in such cases in accordance with the statute, 42 U.S.C. (Supp. III) 1382a (a)(2)(B). However, if Social Security disability benefits were terminated and SSI benefits were not,[25] the amount of the latter would be increased.

The SSI program, which went into effect in January 1974, is also administered through the combined efforts of SSA and the state agencies, in that determinations of "disability" for that program are made by the same state agencies as are used under 42 U.S.C. 421. See 42 U.S.C. (Supp. III) 1383b(a). This program has already placed a heavy workload on the state agencies,[26] and that workload is being felt, and will increasingly be felt, by SSA's Bureau of Disability Insurance. See generally *Staff Report* 55–59, 122–124, 135–137, 396–411.

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[24] See Va. Code 63.1-104, repealed by Va. Code 63.1-25.1 (1974 Supp.).

[25] This could occur if a worker were no longer disabled by federal standards but was still disabled by the state standards applicable under the grandfather clause.

In addition, in legislation enacted in 1969 and 1972, Congress established a program of disability benefits for miners suffering from pneumoconiosis ("black lung" disease), which suddenly imposed an enormous caseload on the Bureau of Disability Insurance[27] under a program that is presently scheduled to last until at least 1981, 83 Stat. 792, as amended, 30 U.S.C. (Supp. III) 901, *et seq.* See generally *Staff Report* 8–9, 119–121, 412–416.[28]

Both of these new programs are also beginning to place great strains on the personnel and resources of SSA's Bureau of Hearings and Appeals, which also handles Social Security disability cases. *Staff Report* 8–9, 58.

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[26] We are informed by SSA that between July 1, 1974, and January 22, 1975, 689,000 disability-related claims under the SSI program were submitted to the state agencies, of which 219,000 were still pending at the end of January 1975.

[27] The state agencies involved in making determinations under the Social Security disability insurance program are not ordinarily involved in making determinations under the black lung program.

[28] SSA's responsibility is generally limited to claims filed before July 1973, the Department of Labor having been given responsibility for most claims filed thereafter. 30 U.S.C. (Supp. III) 925, 931, *et seq.* By the end of 1973, however, more than 500,000 black lung claims had been filed with SSA (*Staff Report* 415) and, according to SSA, 30,000 are now at the hearing stage.

C. GROUNDS FOR TERMINATION OF BENEFITS

Determinations of disability require that the statutory criteria see pp. 16-17, *supra*) be applied to inherently dynamic factual conditions: mental and physical impairments may improve (or worsen); the worker may be rehabilitated through training and therapy; and the existence of jobs the worker can perform may be affected by economic or technological developments. Cf. *Staff Report* 15. Accordingly, eligibility for disability insurance benefits is not permanent and is dependent upon the continued existence of the facts on which the entitlement is based.

The Act, moreover, provides that disability benefits may not be paid for any month in which a worker engages in "substantial gainful activity" as defined by the Secretary. 42 U.S.C. 423(d)(4); see 20 C.F.R. 404.1532–404.1534. In order to encourage disabled workers to return to work, however, the Act also provides for a nine-month "trial work period," beginning with the month in which a worker became entitled to benefits; employment during that period is not to be considered in determining whether a worker's disability ceased during that period, 42 U.S.C. 422(c); see 20 C.F.R. 404.1536; CM § 6703; DISM § 352.1–352.6.[29]

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[29] If a worker's period of disability began within five years after the termination of a prior period of disability, he would have been entitled to his insurance benefits without serving the waiting period (now five months) between the onset of disability and entitlement to monthly benefits. 42 U.S.C. (Supp. III) 423(a). In such cases, the trial work period provision does not apply. CM § 6703.2(c); DISM § 352.3.

Benefit payments to a small proportion of all beneficiaries are terminated each year. Thus, while at the end of 1973 there were 2,016,626 disabled workers receiving monthly disability insurance benefits totalling $4.7 billion annually (*Staff Report* 313), and 1,542,356 auxiliary beneficiaries receiving $1.04 billion ($280 million for disabled workers' spouses, $760 million for their children) (*id.* at 307, 314), during 1973 SSA terminated the benefits of 37,926 workers (and, consequently, their 50,000 or so auxiliary beneficiaries[30]) (*Staff Report* 347), as well as of an additional small number of disabled spouses and children. *Id.* at 310–311.

The principal causes of such terminations are that the worker is no longer disabled or has returned to work (Pet. App. 22A; cf. App. A, *infra,* p. 2A, n. 3).[31] *Staff Report* 347. For auxiliary beneficiaries, changes in relationship, dependency status or age and completion of schooling are also causes of termination (cf. p. 54, *infra,* n. 66).[32] Because this case involves medical recovery, we shall focus on ~~them~~ the procedures in such cases.[33]

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[30] This is an estimate provided by SSA on the assumption that workers whose benefits are terminated have the same average number of auxiliary beneficiaries as do all workers receiving benefits.

[31] In a small number of cases, estimated by SSA to be about two percent of total disability terminations, benefits are terminated because a worker about whom there is an unresolved issue of continuance of disability has persistently refused to cooperate by providing the necessary evidence or cannot be located (see App. A, *infra*, p. 4A, n, 8). CM §§ 6736.4, 6736.5; DISM § 356.

[32] The procedures followed in such cases, which typically do not involve any controversies, differ from those followed in medical recovery cases and are not involved here.

D. THE PROCEDURES FOLLOWED IN TERMINATING BENEFITS BECAUSE OF MEDICAL RECOVERY

In Appendix A to this brief (*infra,* pp. 1A–17A), we set forth in detail the procedures followed, both before and after termination, in terminating Social Security disability insurance benefits because of medical recovery (and return to work). We also include there a variety of statistical data concerning the implementation of those procedures. Here we merely summarize that material.

Determinations that a worker's disability has ceased because of medical recovery—the most common type of disputed determination—typically occur, as in this case, as a result of a medical examination previously scheduled in view of the possibility that the worker would recover (App. A, *infra,* p. 2A). In making such a "continuing disability investigation," the state agency periodically requests the worker to submit information concerning his present condition, medical treatment and medical restrictions, ability to return to work, employment during the past year, receipt of vocational rehabilitation services, and anything else relevant to his continuing entitlement to benefits. Unless the response provides clear-cut evidence of medical recovery, the state agency will obtain information from the worker's sources of treatment and may also obtain a consultative examination of the worker by an independent physician (*id.* at 4A–5A).

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[33] Since the vast majority of terminations involve disabled workers, rather than disabled spouses or children (*Staff Report* 310–311) (36,900 compared with 2,200 in fiscal 1972), we shall also, for convenience, refer only to disabled workers, although the same procedures are followed in the other cases.

A state agency "team" including a physician and a trained disability examiner reviews the evidence. If they believe that the worker is no longer disabled, he is informed of that tentative conclusion, is given a summary of the evidence upon which it is based and is provided at least ten days to respond, with additional time being provided if needed. At this, as at all stages of the disability claim process, the worker may be assisted by counsel or by some other representative, who is entitled to examine all evidence in the worker's file, including the medical reports.[34] Unlike respondent (see p. 8, *supra*), many workers make such further submission, which frequently result in a change of the state agency's tentative determination. Although the worker does not normally appear in person before the state agency, such appearances may be made and procedures exist for incorporating in the worker's file information and observations derived from such interviews (App. A, *infra,* pp. 5A–7A).

The state agency forwards its determination whether the worker is still disabled to SSA's Bureau of Disability Insurance, which reviews it for conformity with uniform national standards. As we have noted (see p. 21, *supra*), SSA may (but only infrequently does) itself determine that disability has ceased but may not make a determination more favorable to the worker than that made by the state agency (see App. A, *infra,* p. 8A). In cases where it would be inclined, if permitted, to make a more favorable determination, SSA may and sometimes does return the case to the state agency for further consideration, which often results in a revised determination favorable to the worker (*id.* at 8A, n. 18).

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[34] The disabled person's direct access to the medical reports is limited, under current regulations, in accordance with accepted medical practice (see App. A, *infra*, p. 6A, n. 13).

When SSA determines (or accepts the state agency's determination) that disability has ceased, it so notifies the worker in writing, stating the basis of its "initial determination" and outlining the worker's right to seek further review. Upon such a determination, the worker receives benefits for two months following the month in which disability ceased (see p. 16, *supra*). In about half the cases the two-month grace period has already expired when the initial determination is made, so that benefits terminate immediately (App. A, *infra,* p. 9A; App. C, *infra,* p. 64A).[35]

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[35] The Act authorizes the Secretary to "suspend" the payment of benefits pending inquiry by the state agency as to cessation of disability. 42 U.S.C. 425. Unlike the suspension procedures involved in *Richardson* v. *Wright*, *supra*, the current procedures provide for "suspension" of benefits in a limited category of cases, but only after the worker has had a pre-termination hearing. See CM §§ 6706, 6707; DISM §§ 265.1D 265.2. This authority may be used if, because of the date of cessation of disability, overpayments are already being made or are imminent. In practice, however, benefits are seldom suspended, and it occurs primarily in cases where the worker has returned to work, rather than in cases of medical recovery. In some cases, moreover, payment of benefits are suspended at the request of the beneficiary (see CM § 6736.7), who may wish to avoid responsibility for receipt of overpayments while his entitlement to benefits is in doubt. Respondent's benefits were not suspended, and the suspension procedures are not directly in issue here.

Following an adverse initial determination, a worker may request "reconsideration," in which event a different team at the state agency will review the record *de novo,* considering any additional evidence submitted by the worker or obtained by the state agency itself (*e.g.*, an additional medical examination). The state agency's decision on reconsideration is reviewed by SSA as in the case of initial determinations. Decisions on reconsideration are typically made within two to four months of a request for reconsideration (App. A, *infra,* pp. 9A–11A).

If the decision on reconsideration is adverse, the worker may obtain an evidentiary hearing before an SSA administrative law judge, at which the worker may (but need not) appear personally, present new evidence and subpoena witnesses. These hearings are non-adversary in character: SSA is not represented by counsel or other staff, and the judge's determination is based on the evidence in the worker's file, which the judge considers *de novo,* and such other evidence as the worker submits or the judge himself secures (*e.g.,* an additional medical examination). Because of the enormous workload imposed under the various programs administered by SSA, which has substantially enlarged the backlog of hearing requests (see pp. 22–24, *supra*), it now takes between ten and eleven months between a request for hearing and a decision (App. A, *infra,* pp 11A–12A).

If such a post-termination evidentiary hearing results in an adverse decision, the worker may request discretionary review by SSA's Appeal Council, which may review the record *de novo* and may receive additional evidence (*id* at 12A–13A). After an adverse decision or denial of review by the Appeals Council, the worker may obtain judicial review. The district court, unlike all prior levels of review, is required to treat findings as conclusive if they are supported by substantial evidence (*id* at 13A–14A).

The great bulk of investigations of possible cessation of disability conducted pursuant to the pre-termination hearing procedure in issue here, result in initial determinations that the worker's disability has continued: about 120,000 out of about 155,000 initial determinations in fiscal 1973—more than 75 percent (*id.* at 2A, n. 3). Moreover, only a relatively small proportion of determinations that disability has ceased are "reversed" on post-termination review.

Thus, of about 35,000 adverse initial determinations in fiscal 1973, in only about 9,000 (25 percent) was reconsideration sought; in about 40 percent of reconsiderations in initial disability cases the decision is favorable to the worker (*id.* at 10A, 11A, n. 21).[36] Of the 5,600 adverse decisions after reconsideration in disability cessation cases, in only 1,900 (34 percent) was a hearing requested; after hearing in initial disability cases in about 40–50 percent—in many of which the worker did not appear personally—the decision is favorable to the worker (*id.* at 11A, 12A, n. 24). The Appeals Council ruled in the workers favor in about twelve percent of all disability cases it reviewed in fiscal 1973 (*id.* at 13A).

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[36] Data for initial disability cases is thought by SSA to be reasonably representative in this regard of the pattern in termination cases.

Although the data for all stages of the review process are not precisely comparable, these figures indicate that only in about fifteen percent of the initial determinations of cessation of disability does post-termination review result in a decision favorable to the worker. Most of these "reversals," moreover, occur at the reconsideration stage, which is conducted under essentially the same procedures as the typical pretermination inquiry, *i.e.,* on a paper record without personal appearance of the worker and without confrontation or cross-examination of witnesses.

E. RETROACTIVE ADJUSTMENTS OF UNDERPAYMENTS AND OVERPAYMENTS

If, at any point after the payment of benefits has been terminated, it is determined (whether on reconsideration, after a hearing, or on judicial review) that the worker's disability continued beyond the date of cessation established in the initial determination, then the worker is entitled to retroactive payment of benefits in accordance with the subsequent determination. Cf. 42 U.S.C. 423(b).

On the other hand, if a beneficiary receives any benefits to which he is later determined not to be entitled, the Act authorizes the Secretary to reduce any other payments to which the beneficiary is entitled, or to require the beneficiary to refund the overpayment (42 U.S.C. 404(a)(1)), unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or "would be against equity and good conscience." 42 U.S.C. 404(b). See generally 20 C.F.R. 404.501–404.515. In many cases a beneficiary who is eventually found to be no longer disabled would be "without fault" for any receipt of benefits in the interim or otherwise not liable for overpayments. In addition, since many such beneficiaries have limited financial resources, there is limited practical likelihood that overpayments can be recovered, particularly since there is frequently no opportunity to withhold portions of other payments and the amounts may not justify litigation.

II

THE PROCEDURES FOR TERMINATION OF SOCIAL SECURITY DISABILITY BENEFITS SATISFY DUE PROCESS REQUIREMENTS

The issue in this case is the constitutionality of the procedures by which Social Security disability benefits are terminated when, because of changes in the medical condition of the beneficiary, his disability has ceased. The lower courts held that the procedures are unconstitutional because they do not provide an evidentiary hearing before, rather than after, the benefits are terminated. The courts thus extended to the termination of Social Security disability insurance payments the procedures that this Court held in *Goldberg* v. *Kelly,* 397 U.S. 254, are constitutionally required for the termination of state welfare benefits.

We submit that the procedures used in terminating Social Security disability payments satisfy due process. The Social Security disability program is sufficiently different from the state welfare program involved in *Goldberg* v. *Kelly* to permit different procedures under the two programs. The procedures for terminating Social Security disability benefits provide an adequate and fair opportunity for a beneficiary to submit all relevant information necessary to enable the Social Security Administration to make an informed and reliable judgment whether the disability has ceased. Indeed, respondent apparently acknowledged this when, prior to the initial decision by the state agency that he was no longer disabled, he declined to submit additional material on the ground that the state agency already had "enough evidence" to make a decision (see p. 8, *supra*).[37]

The adequacy of the procedures for terminating disability benefits cannot be determined in a vacuum, but must take account of the complexity and magnitude of the Social Security disability program, the vast number of termination proceedings now conducted, and the effect upon the program if an evidentiary hearing were required in every case before benefits could be terminated. "The [Social Security] system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. But * * * '[s]uch a system must be fair—*and it must work.*' " *Richardson* v. *Perales, supra*, 402 U.S. at 389

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[37] The correctness of SSA's initial determination that respondent is no longer disabled is not before the Court. That determination is not subject to judicial review except in accordance with 42 U.S.C. 405(g), and respondent has not taken the necessary steps to obtain such review (*i.e.*, seeking reconsideration, a post-termination hearing, and Appeals Council review (see App. A, *infra*, pp. 9A–13A).

(emphasis supplied). The procedures by which disability payments are now terminated are fair and they work.

The starting point for determining the constitutionality of these procedures is the settled proposition "that the interpretation and application of the Due Process Clause are intensely practical matters and that 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895 (1961)." *Goss* v. *Lopez,* No. 73–898, decided January 22, 1975, slip op. at 12. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471, 481.

Accordingly, a resolution of a procedural due process claim requires a discriminating analysis of the relevant interests at stake. Compare, *e.g., North Ga. Finishing, Inc.* v. *Di-Chem, Inc.,* No. 73–1121, decided January 22, 1975, with *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600. While "*some* kind of notice and * * * *some* kind of hearing" constitute the fundamental requisites of due process (*Goss* v. *Lopez, supra,* slip op. at 13) (emphasis in original), "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. *Cafeteria Workers* v. *McElroy, supra,* [367 U.S.] at 895; *Morrissey* v. *Brewer, supra* [408 U.S.] at 481." *Ibid.*

The Court has identified three general interests that must be assessed in determining the constitutional sufficiency of procedures for denying or terminating constitutionally-protected interests. They are: first, the nature of the property (or liberty) interest of which a person is assertedly being deprived (cf., *e.g., Wolff* v. *McDonnell,* No. 73-679, decided June 26, 1974, slip op. 19); [38] second, the risk of an erroneous deprivation of such interest through the procedures used (*e.g., Goss* v. *Lopez, supra,* slip op. at 14-16); and third, the administrative burdens and costs that particular procedural requirements would entail. *Id.* at 17.

The procedures the Secretary follows in terminating Social Security benefits—under which the beneficiary is fully informed of the reasons for the proposed termination and given the opportunity to submit any material he wishes relating to the continued existence of the disability, but an evidentiary hearing is held only after the initial termination of benefits has been made—appropriately accommodate the interests involved in the operation of the Social Security disability program, and therefore satisfy due process.

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[38] In rejecting contentions that particular laws or administrative actions denied either substantive or procedural due process, the Court has assumed that the statutory entitlements to disability insurance benefits and other Social Security benefits constitute "property" under the due process clause of the Fifth Amendment. *E.g., Flemming* v. *Nestor*, 363 U.S. 603, 611; *Richardson* v. *Perales*, *supra*, 402 U.S. at 401; *Richardson* v. *Belcher*, *supra*, 404 U.S. at 80-81. We do not here contend that respondent's asserted entitlement to continued receipt of disability insurance benefits is not a "property" interest protected against arbitrary deprivation by the due process clause. Rather, we contend that the existing procedures provide all the process that is constitutionally due before respondent can be initially deprived of that interest.

A. THE NATURE OF THE WORKER'S INTEREST IN SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

The disability benefits involved in this case are significantly different from the welfare benefits involved in *Goldberg* v. *Kelly, supra,* upon which the courts below relied. That case involved welfare benefits payable to "needy families with children" (42 U.S.C. 601, *et seq.*), or to "any person unable to support himself or to secure support from other sources." 397 U.S. at 256, n. 1. The Court observed that the " 'one overpowering fact' " was that, " '[b]y hypothesis, a welfare recipient is destitute, without funds or assets,' " and faces " 'brutal need.' " *Id.* at 261. The Court concluded that (*id.* at 264; emphasis in original, footnote omitted):

> the crucial factor in this context—a factor not present in the case of * * * virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

In sum, it was because " '[t]he stakes are simply too high for the welfare recipient' " (*id.* at 266) that the Court concluded that an evidentiary pre-termination hearing was required.

By contrast, Social Security disability benefits are not based upon need (see pp. 15–19, *supra*).[39] While many recipients of such benefits may rely heavily upon them, they are not "by hypothesis" (*Goldberg* v. *Kelly*) "the last source of support available, aside from charity * * *." *Arnett* v. *Kennedy,* 416 U.S. 134, 191 (White, J., concurring in part). Like recipients of other governmental payments subject to termination, a disability beneficiary "may well have independent resources to overcome any temporary hardship, and he may be able to secure a job * * *. Alternatively, he will be eligible for welfare benefits." *Arnett* v. *Kennedy, supra,* 416 U.S. at 169 (Powell, J., concurring in part). In addition to the "basic floor of need" provided by the welfare system (*id.* at 202 (White, J., concurring in part)), the worker may be entitled to benefits under other public and private programs (see pp. 17–18, *supra*), and other family members may have jobs or other income.

In short, the beneficiary "is not totally without prospect for some form of support during the period between the pretermination and final hearing on appeal, though it may not be equivalent" (*id.* at 201–202 (White, J., concurring in part)) in amount or continuity to his prior disability benefits. Indeed, while the record in this case does not show whether respondent has other income or assets, he professed to be able to "get by" without Social Security benefits (A. 14).[40] He did not seek reconsideration of SSA's determination that he was no longer disabled although, had he done so, that procedure held out the greatest likelihood for a prompt correction of any error in the determination (see p. 31, *supra*).[41]

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[39] Under the SSI program (see pp. 22–24, *supra*), in which need is a factor, the statute provides for an oral evidentiary hearing (held by SSA) concerning a determination about eligibility (42 U.S.C. (Supp. III) 1383(c)), and SSA terminates SSI benefits only after such a hearing, if requested, 20 C.F.R. 416.1336(c), 40 Fed. Reg. 1512; see *Staff Report* 346.

B. THE RISK OF AN UNRELIABLE DECISION RESULTING FROM THE EXISTING PRE-TERMINATION HEARING PROCEDURE

The rules of procedure required by due process "may be shaped by consideration of the risks of error" (*Wolff* v. *McDonnell, supra,* slip op. at 26), in part because "[t]he greater the level of deprivation which may flow from a decision, the less one may tolerate the risk of a mistaken decision * * *." *Arnett* v.

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[40] The record does not indicate whether respondent has sought or received other benefits, such as public assistance or state aid to the needy disabled, nor does it reveal whether he was eligible for or sought SSI benefits for the needy disabled (see pp. 22–24, *supra*).

[41] Because "the possible length of wrongful deprivation of * * * benefits is an important factor in assessing the impact of official action on the private interests * * * the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process." *Fusari* v. *Steinberg*, No. 73–848, decided January 14, 1975, slip op. at 10–11. While no precise data are available as to disability terminations, the data as to all other disability determinations indicate that, if respondent had promptly sought reconsideration, he would have had his claim considered anew, along with any new evidence he chose to submit, by different people. The vast majority of "reversals" occur at the reconsideration stage, where decisions are typically made within a few months of the request for reconsideration (see p. 31, *supra*).

Kennedy, supra, 416 U.S. at 201 (White, J., concurring in part). That risk depends in part upon "the nature of the issues at stake" (*Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. at 609), whether they "lend themselves to documentary proof" (*ibid.*), and the nature and extent of consideration they receive at the pre-termination stage (*id.* at 616–617).

By definition, disability terminations involve persons who have already been found to be "disabled" within the meaning of the Act on the basis of specific facts. Termination of disability benefits will ordinarily result only when there has been some distinct change of circumstances. As we have noted (see p. 26, *supra*), medical recovery is the usual change underlying disputed terminations.[42]

This Court has observed that, unlike the welfare eligibility proceedings involved in *Goldberg* v. *Kelly, supra,* where the decision turns on a medical judgment about the worker's condition and capabilities, "the specter of questionable credibility and veracity is not present," even though there may be "professional disagreement with the medical conclusions * * *." *Richardson* v. *Perales, supra,* 402 U.S. at 407.[43]

Medical recovery terminations, like the initial determinations of disability, rely heavily upon "routine, standard, and unbiased medical reports by physician specialists concerning a subject whom they" have examined (*id.* at 404), the general reliability and probative value of which reports have been "uniformly recognized." *Id.* at 405.[44] In addition, "[t]he vast workings of the social security administrative system make for reliability and impartiality in the consultant reports" (*id.* at 403), reflecting the fact "that the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary." *Ibid.*

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[42] This case involves termination because of medical recovery, and does not present any question concerning the relatively rare terminations where a beneficiary would not cooperate or could not be located (see p. 26, *supra*, n. 31).

[43] In return-to-work cases, the determinations are frequently based upon employers' wage reports and other routine filings made subject to penalties for false statements. 26 U.S.C. 6674, 7204; 42 U.S.C. 408; see 18 U.S.C. 1001.

More specifically, as in respondent's case, the worker is given several meaningful and effective opportunities before termination of benefits to demonstrate that he still is disabled. The efficacy of these procedures is shown by the fact that approximately 80 percent of the continuing disability examinations result in determinations that the worker is still disabled (see p. 31, *supra*).

If the state agency has tentatively decided that disability has ceased, it gives the worker a summary of the basis for that conclusion, tailored to his case and prepared so as to be understandable (App. A, *infra,* pp. 6A–7A), and an ample opportunity to respond and submit additional evidence (*ibid*). Such further submissions are frequently made and often result in a determination favorable to the worker (see *id.* at 7A, n. 14). Probably more often than in welfare cases, workers in disability termination cases are assisted by counsel or some other representative at this and all other stages (see *id.* at 6A, n. 12). The determination whether disability has terminated is made by a team of dispassionate, trained professionals applying detailed guidelines and standards, not by caseworkers who may have had adverse personal confrontations with the beneficiary. Before adopting a state agency's adverse decision, SSA reviews it to insure conformity with uniform national standards (see *id.* at 8A).

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[44] We do not contend "that the 'credibility and veracity' of doctors and employers can never be in issue in a disability case" (*Richardson* v. *Wright*, *supra*, 405 U.S. at 219 (Brennan, J., dissenting)), for procedural rules are designed for the generality of cases, not the rare exceptions.

These pre-termination procedures are suitably "tailored to the capacities and circumstances of those who are to be heard." *Goldberg* v. *Kelly, supra,* 397 U.S. at 268–269. Unlike welfare recipients, disabled workers usually have substantial recent employment experience (see p. 16, *supra*),[45] and also have sufficient educational experience so that "[w]ritten submissions are [not] an unrealistic option for most recipients * * *." *Goldberg* v. *Kelly, supra,* 397 U.S. at 269.[46]

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[45] A study based on data for 1965 found that only 53 percent of the severely disabled persons receiving public assistance on account of their disabilities were employed at the onset of those disabilities, whereas 91 percent of disabled worker beneficiaries under the Social Security Act had been so employed. Brehm, *The Disabled on Public Assistance*, in Department of Health, Education and Welfare, *Social Security Survey of the Disabled: 1966*, *Rep. No. 9*, at 5 (1970).

[46] In 1971, 86 percent of workers under 30 who were awarded benefits, 62 percent of those between 45 and 49, and 48 percent of those 60 or over had attended school to at least the ninth grade. Fifteen percent of the beneficiaries under 30 had attended college for at least one year. *Staff Report* 320.

The substantial reliability of the existing procedures for making initial determinations that disability has ceased is suggested by the fact that as to only a small number—probably about fifteen percent—is it held at later stages of review that the worker is still disabled (see p. 31, *supra*).[47]

Moreover, those cases cannot all be regarded as "reversals" in the usual sense. Cf. Dixon, *supra,* at 33, 41. The fact that a decision favorable to the worker is made after an initial determination that the worker is no longer disabled does not necessarily mean that the earlier decision was "erroneous." The program is operated on an open-file basis, and a worker may continuously update his file by submitting new evidence (see pp. 30–31, *supra*).[48] Moreover, borderline cases frequently turn not on factual disputes but on questions of judgment about the effect of physical limitation or discomfort on a worker's ability to perform suitable tasks. Indeed, as with initial disability claim proceedings, the "reversal" rate "attests to the fairness of the system and refutes the implication of impropriety." *Richardson* v. *Perales, supra,* 402 U.S. at 410.

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[47] For example, in fiscal 1973, there were 575,300 initial determinations adverse to workers' initial disability claims, but claims were allowed as to only 61,900 on reconsideration, only 24,100 after evidentiary hearings, only 1,918 after review by the Appeals Council (318 after remand from the courts), and only 172 by the courts. *Staff Report* 308–311. Thus, a total of 88,090 claims were allowed after post-termination review, which constituted fifteen percent of claims initially denied that year.

[48] The fact that more time has elapsed between the initial determination and the post-hearing decision than the initial determination and the decision on reconsideration (see App. A, *infra*, p. 11A. n. 22, p. 12A, n. 23) tends to inflat the post-hearing "reversal" rates to some degree. See Dixon, *supra*, at 41.

The lower courts in this case held the existing pre-termination procedures constitutionally deficient because, despite their evident reliability, they do not include the opportunity for the beneficiary to be heard in person and to confront and cross-examine witnesses providing the evidence upon which the termination of benefits is based (Pet. App. 6A, 10A–11A), elements required in the welfare context by *Goldberg* v. *Kelly, supra.* There is nothing to indicate, however, that those procedural rights would improve to any significant extent the already substantial reliability of the existing procedures.

Given the nature of the issues and the evidence relied upon, the right to confront and cross-examine witnesses (frequently physicians), even if practicable, is not likely to aid the worker appreciably because of the inherent reliability of the physicians' reports (see pp. 40–41, *supra*).[49] Indeed, respondent has not suggested any respect in which this right would have assisted him.

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[49] In requiring that the Secretary give a recipient of Social Security disability benefits a pre-termination evidentiary hearing "in the nature of that required for welfare beneficiaries" by *Goldberg* v. *Kelly*, *supra* (Pet. App. 17A–18A), the courts below did not clearly indicate whether they were holding that the doctors who provide medical reports must be produced for cross-examination at such a hearing. While *Goldberg* v. *Kelly* required that welfare beneficiaries "be given an opportunity to confront and cross-examine the witnesses relied on by the department" (397 U.S. at 270), the Court indicated in *Perales* that the doctors themselves need not routinely be produced, even in a full-scale post-termination evidentiary hearing. 402

With respect to a personal appearance by the worker—which is possible under present procedures (see p. 28, *supra*), but which respondent did not request—the minor significance of this element is shown by the large number of cases in which initial adverse decisions are reversed in reconsideration proceedings, in which the worker ordinarily does not appear personally (see p. 31, *supra;* App. A, *infra,* p. 12A, n. 24).[50] This conclusion is further supported by the fact that relatively few beneficiaries whose terminations are upheld on reconsideration request an evidentiary hearing (see p. 31, *supra*).

C. THE SUBSTANTIAL ADMINISTRATIVE BURDEN AND COSTS OF REQUIRING EVIDENTIARY HEARINGS PRIOR TO TERMINATION OF SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

In deciding procedural due process issues, the Court has repeatedly emphasized that the rules of procedure must "be shaped by the consequences which will follow their adoption." *Wolff* v. *McDonnell, supra,* slip

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U.S. at 406–407. As the Court observed in *Perales*, a requirement of live medical testimony at a substantial number of hearings (regardless of who holds the hearings) would not only place "a substantial drain on the trust fund," because of the larger consultant fees that would be required, but, perhaps more importantly, would also impose "a substantial drain * * * on the energy of physicians already in short supply." *Id.* at 406.

[50] While the rate of favorable decisions appears to be somewhat greater for all who seek hearings (see p. 31, *supra*), it is not known to what extent that is attributable to submission of new evidence, worsening of the worker's condition due to passage of time, personal appearance of the worker, or other reasons.

op. at 26. For example, confrontation and cross-examination are not required if the proceedings would "be longer and tend to unmanageability." *Id.* at 25. See, also, *Gerstein* v. *Pugh,* No. 73–477, decided February 18, 1975, slip op. at 18, n. 23.

In terminating disability payments, "a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted" terminations of benefits. *Arnett* v. *Kennedy, supra,* 416 U.S. at 168 (Powell, J., concurring in part). "To impose in each * * * case even truncated trial type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in * * * [program] effectiveness." *Goss* v. *Lopez, supra,* slip op. at 17. Speaking with particular reference to the 20,000 disability claim hearings then held annually, the Court referred in *Richardson* v. *Perales, supra,* 402 U.S. at 406, to the "sheer magnitude" of the administrative burden that would result if reliance on a paper record were impermissible.[51]

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[51] Indeed, in *Goldberg* v. *Kelly*, *supra*, the Court took note of the fact that "[s]ummary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible * * * [and] conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held." 397 U.S. at 265. The Court also noted that the requirement of a prior public hearing involves greater expense to the extent that benefits paid to ineligible recipients pending the hearing and decision cannot be recouped because the recipients are judgment proof. *Id.* at 266. While these governmental interests were "not overriding in the welfare context" (*ibid.*), because of the unique importance of welfare benefits to the recipients (see p. 37, *supra*), the Court did not suggest that they should not be given greater effect in other contexts.

The administrative burdens and costs apprehended by the Court in *Perales* would be even more severe if the full pre-termination hearing requirements of *Goldberg* v. *Kelly* were imposed upon the Social Security disability insurance program. Operating through an already complex administrative structure, that program has been growing rapidly,[52] and is expected to expand at an accelerated rate, particularly if unemployment remains substantial. *Staff Report* 15. In mid-1974, state agencies were making more than 60,000 disability determinations a week (in both Social Security and SSI cases). *Id*. at 3.

In coping with this burgeoning caseload, SSA has continually attempted "to evolve procedures to meet needs as they arise." *Richardson* v. *Wright, supra,* 405 U.S. at 209. The pre-termination hearing requirements imposed here, however, could not be handled by adjusting existing procedures, but would instead require a fundamental restructuring of the existing institutions. It would impose heavy administrative and financial strains upon already-overburdened agencies.

As we have noted, the Act requires that determinations of cessation of disability because of medical recovery must initially be made by the state agencies (see pp. 19–21, *supra*). Those agencies, however, are presently not equipped to hold evidentiary hearings. Their staffs consist of doctors, disability examiners and vocational counselors, who already have an expanding heavy caseload.[53] They do not have people who can properly serve as hearing examiners. Those agencies typically operate out of a central office, so that expensive and time-consuming travel would be required either by the worker or by the state agency staff. A hearing structure would have to be constructed from the ground up in each state, an inevitably time-consuming and costly process.

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[52] The number of disabled workers and dependents receiving benefits increased from 750,000 in 1960 to about 3.5 million in 1973. *Staff Report* 3.

SSA has recently undertaken a test project to determine the feasibility and cost of providing a limited form of personal hearing on reconsideration at the state agency level. At present, however, SSA does not know how workable or expensive such a procedure would be. But, as the Court observed in *Perales,* the system not only must be fair, "it must work." 402 U.S. at 399.

The alternative procedure of having SSA itself hold a pre-termination evidentiary hearing is scarcely more practical. (There is a substantial question whether that would be permissible under the Act[54]). SSA district offices, although numerous and conveniently located, do not have on their staffs persons with the training and experience necessary to make judgments about medical recoveries or vocational issues.

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[53] In fiscal 1973, all state agencies employed a total of approximately 4,700 employees handling disability cases and made more than 900,000 initial determinations in such cases. *Staff Report* 162.

[54] As we have noted (see pp. 19–2[illegible], *supra*), in medical recovery cases the determination whether a worker's disability has continued or ceased must be made by the state agency, and SSA is not permitted on review of such a state agency determination, to make a determination in the worker's favor. 42 U.S.C. 421(a)(c). Only after a post-termination hearing pursuant to 42 U.S.C. 405(b) may SSA decide in favor of the worker. See 42 U.S.C. 421(d). If there were a right to a pre-termination hearing held by SSA, and SSA's decision after such a hearing were

SSA's limited number of administrative law judges and hearing examiners are already overburdened with their existing and unavoidable caseload under the Social Security, SSI and black lung programs (see pp. 22–24, *supra*),[55] and significant delays already exist between requests for hearings and decisions in those cases (see App. A, *infra*, pp. 11A, n. 22, 12A n. 23). Despite the growth of SSA's Bureau of Hearings and Appeals,[56] as of December 1974 it had a backlog of

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to be dispositive, the state agency's adverse determination would not necessarily be given effect as "the determination of the Secretary" as 42 U.S.C. 421(a) requires. Additional problems would be presented if the state agency were required to accept the determination made by SSA after the latter held a hearing. Cf. *Morgan* v. *United States*, 298 U.S. 468, 481. ("The one who decides must hear.")

[55] As the number of disability beneficiaries has increased, there has been a corresponding surge in the use of the administrative decision-making process:

	Fiscal year—				
	1970	1971	1972	1973	1974*
Total decisions	904, 600	1, 118, 100	1, 231, 700	1, 249, 500	1, 423, 600
Initial	765, 800	952, 900	1, 016, 100	1, 024, 500	1, 162, 600
Reconsideration	97, 700	116, 800	159, 500	156, 800	188, 400
Hearings	31, 300	37, 100	43, 900	53, 100	55, 600
Appeals council	8, 800	10, 000	11, 000	13, 500	15, 700
Court decisions	1, 000	1, 300	1, 200	1, 600	1, 300
Court actions filed**	1, 239	1, 561	1, 820	2, 268	2, 534

Source: *Staff Report* 308
* 1974 figures compiled by SSA subsequent to *Staff Report*
** Calendar year figures, compiled by SSA.

[56] The Bureau has grown from having a budget of $21.8 million and 1,278 employees in 1970 to a budget of $43 million and 2,044 employees in 1974. *Staff Report* 31.

102,129 hearing requests,[57] the vast majority involving disability issues. SSA anticipates that even under existing programs and procedures this backlog will increase to about 130,000 at the end of fiscal 1975. SSA's efforts to increase its existing staff of hearing officers [58] have thus far been hampered by the difficulty in obtaining rapidly a sufficient number of qualified candidates satisfying Civil Service requirements. But even an enlarged corps of hearing officers all operating at maximum efficiency [59] would be hard-pressed to reduce the existing backlog, now estimated by SSA to

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Requests for Hearing Pending as of December 8, 1974

[57] Retirement and survivors insurance benefits	1,701
Disability insurance benefits	45,048
Black lung benefits	33,888
Supplemental security income (mostly disability)	18,035
Disabled widow's/widower's insurance benefits	2,262
Health insurance benefits	1,195
Total	102,129

[58] Hearing Personnel on Duty as of January 1975:

	ALJ's[a]	BL ALJ's[b]	SSI HE's[c]	Total
As of Nov. 15, 1974	410	110	92	612
Projected as of July 1, 1975	[d] 395	125	170	690

[a] Administrative Law Judges—GS 15 $29,818—$36,000.

[b] Temporary Black Lung Administrative Law Judges (authorized to handle only Black Lung cases)—GS-14 $25,581—$33,258.

[c] SSI Hearing Examiners (authorized to handle only SSI cases)—GS-13 $21,816-$28,359.

[d] While SSA expects to appoint 15 additional ALJ's, it anticipates attrition of 30, for a net loss of 15.

[59] According to SSA, experienced hearing officers (after nine months on duty) dispose of 190 cases annually. When the present 612 hearing officers have all been on duty nine months, SSA will have the capability to dispose of 9,690 hearings per month. But some of the hearing officers are still in training, and others are just beginning to conduct hearings.

involve a delay of between ten and eleven months from hearing request to decision.[60]

The impact of a requirement of a pre-termination evidentiary hearing in all cases cannot be assessed precisely because one can only speculate about the number of beneficiaries who would seek such a hearing and the attendant delays and costs. The number would be substantial—25 percent of those who receive adverse initial determinations, or about 11,000 in fiscal 1976 (see App. C, *infra,* p. 63A) seems a reasonable estimate.[61] Moreover, some beneficiaries who now accept an adverse initial determination would be likely to request a pre-termination hearing if the effect would be to prolong the payment of benefits.[62]

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[60] Complete elimination of such delay would be infeasible. In fiscal 1973, in 31.1 percent of the state agencies cases at the reconsideration stage and 42.7 percent of the cases at the hearing stage, a consultative medical examination was held. *Staff Report* 238. These examinations must be arranged at the convenience of both the physician and the worker. In addition, delay in disposition after a request for a hearing inevitably results from the normal constituents of an adjudicatory proceeding—*e.g.*, the need to schedule the hearing at the beneficiary's convenience, to secure the attendance of witnesses (if any), to file briefs, and to render a decision.

[61] A reasonable guideline is the fact that in recent years about 25 percent of workers sought reconsideration of initial determinations that they are no longer entitled to benefits (see p. 31, *supra*).

[62] An assumption that the number of beneficiaries who would request a pre-termination evidentiary hearing might exceed the number who would request post-termination review, perhaps encouraged in their persistence because of the prolonged payment of benefits resulting from a hearing request, is supported by the experience of the states with welfare terminations following the decision in *Goldberg* v. *Kelly*, *supra*, in March

Requiring SSA to provide such a substantial number (at least 11,000) of additional[63] hearings would have severe adverse consequences upon the functioning of the Social Security system. Depending on which cases were heard first, for a considerable period either the pre-termination disability cases would face

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1970. As shown in the following table, the ratio between discontinuances of public assistance payments and disposition of hearing requests concerning such discontinuances altered significantly in the period following the decision, indicating a likelihood that hearings were being increasingly requested.

Period	A Number of public assistance cases where money payments were discontinued	B Number of hearing requests disposed of where the issue was the discontinuance of assistance	C Percentage of hearings (col. B / col. A x 100)
July to December 1970	403,070	5,000	1.2
January to June 1971	551,339	6,500	1.2
July toDecember 1971	772,588	9,354	1.2
January to June 1972	807,822	15,866	2.0
July to December 1972	953,807	19,442	2.0

Department of Health, Education and Welfare, *Fair Hearings in Public Assistance*, Publication Nos. 72–03257 (1972), 72–03253 (1972), 73–03253 (1973), 73–03257 (1973), 74–03257 (1973), Department of Health, Education, and Welfare, *Reasons for Discontinuing Money Payments to Public Assistance Cases, NCSS Rep. A–11*, Publication Nos. 72–03108, 72–03109 (quarterly).

If the rate differentials here are representative, they suggest that pre-termination evidentiary hearings would be requested at 1.67 times the rate of requests for post-termination review (*i.e.*, 1.67 is the amount by which the base rate of 1.2 hearing requests per 100 discontinuances must be multiplied to obtain the rate of 2.0). Thus, 11,000 post-termination reconsiderations would convert to 18,370 pre-termination hearings.

[63] In *Golberg* v. *Kelly*, the Court anticipated that, in addition to the pre-termination hearing there required, the existing right to an even more substantial post-termination hearing would continue. 397 U.S. at 266-267. It is not entirely clear, moreover, that a pre-termination hearing satisfying *Goldberg* v. *Kelly* would meet the constitutional standards for the hearing required before a person may be finally deprived of property.

substantial delays or other cases handled by the Bureau of Hearings and Appeals would face additional [64] delays. Insofar as the burden of delay was borne by the Social Security disability termination cases, many workers no longer eligible would receive trust fund payments that might never be recouped. On the other hand, other eligible claimants would be temporarily deprived of benefits for a more prolonged period [65] if the termination cases were heard first. Neither result is readily acceptable.

A pre-termination hearing requirement in Social Security disability insurance cases would entail substantial costs. Appendix C to this brief contains data estimating that the cost would be at least $15 million to $25 million annually at the current level of benefits, salaries and other costs. Such added costs would constitute a substantial drain on the trust fund and would represent funds that cannot be used to pay benefits to eligible disabled workers.

The disability trust fund—sustained by receipts from a special payroll tax—is already facing an actuarial deficiency, a situation likely to be worsened by prolonged unemployment, which results in increased claims for benefits and decreased revenues. *Staff Report* 4, 13–16, 332–344, 348–350. In view of the ever-escalating demands of other social programs, it cannot be lightly assumed that Congress will provide sufficient supplemental financial support for the disability program so that the beneficiaries will not bear directly any added costs of overpayments and administration.

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[64] As we have noted (see p. 51, *supra*), the current delay is about ten months between hearing request and decision.

[65] The majority of the cases heard by the Bureau under SSA's various programs involve initial claims for benefits, rather than terminations. This Court has never suggested that such claimants are entitled to receive benefits pending an appeal from an initial determination that they are ineligible. Cf. *Richardson* v. *Perales*, *supra*, 402 U.S. at 407.

If evidentiary hearings are required prior to termination of disability insurance payments, that requirement might also be extended to other Social Security programs, under which SSA terminates the benefits of more than 1,500,000 persons annually.[66] Requiring hearings in all those cases would increase the administrative and financial burdens upon SSA even more seriously.[67]

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[66] SSA estimates for fiscal 1976 the following volume of terminations or reductions of benefits under Title II of the Social Security Act alone for reasons other than death or attainment of age 65:

Termination event	*Estimated annual volume*
Attainment of age 18 or 22 of a child or student	500,000
Current year work report	400,000
Marriage, remarriage, or divorce of auxiliary beneficiary or survivor	200,000
Termination of benefits to a young wife or young widow due to attainment of age 18 of last entitled child on same earnings record	200,000
Cessation of full-time school attendance	150,000
Entitlement of Additional Beneficiary	40,000
No entitled child in care of young wife or widow	20,000
Total	1,510,000

[67] In *Richardson* v. *Wright*, *supra*, Mr. Justice Brennan estimated that, based on the smaller base of Title II terminations in 1969, there would be about 100,000 terminations under other Title II programs as to which a pre-termination evidentiary hearing might be required. 405 U.S. at 226.

* * * * *

A comprehensive congressional study of the Social Security disability programs recently concluded that "[t]here is a substantial question as to whether the multitiered Social Security appeals procedure can withstand the *current* workloads under Social Security and SSI, even if the present Black Lung situation is only a temporary aberration." *Staff Report* 5 (emphasis supplied). The study expressed concern "that any further enlargement of Social Security responsibilities may be 'the straw that breaks the camel's back.'" *Id.* at 9. Even if that gloomy assessment turns out to be somewhat overstated, it suggests the dangers in substantially augmenting the heavy existing administrative burdens of SSA.

Imposing on the termination of social security disability payments the procedures established by *Goldberg* v. *Kelly* for terminating state welfare benefits "would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson* v. *Perales, supra,* 402 U.S. at 410. The procedures now followed in terminating social security disability benefits are fair, and they work. They are the product of a continuing evolution of procedures "to meet needs as they arise." *Richardson* v. *Wright, supra,* 405 U.S. at 209. They should not be found constitutionally deficient on the basis of unfounded hypotheses that an untested system of oral evidentiary hearings prior to termination of benefits would be so markedly fairer and more reliable as to justify the enormous attendant administrative burdens and costs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

THE PROCEDURES FOLLOWED IN TERMINATING SOCIAL SECURITY DISABILITY INSURANCE BENEFITS

Because a worker's "disability" and entitlement to benefits may and frequently do change, a disabled worker's file is always "open" for new evidence and the Secretary has adopted procedures calling for "continuing disability investigations" to reexamine periodically a prior finding of disability.[1] When a worker is awarded benefits because of a disability, SSA informs the worker about the conditional nature of the determination and the continuing review of disability.[2]

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[1] See 20 C.F.R. 404.1521, *et seq.* The continuing disability investigation procedures are contained in SSA's Claims Manual ("CM"), §§ T6260, *et seq.*, and §§ T6700, *et seq.* (see App. B, *infra*), and the Disability Insurance State Manual ("DISM"), §§ 350, *et seq.* (see Pet. App. 19A–75A).

[2] Thus, SSA's notification of entitlement to benefits is accompanied by a booklet (*Your Social Security Rights and Responsibilities: Disability Benefits*) (March 1974)) which states (p. 7) that

"[y]our eligibility ends if your condition improves so that you are capable of doing substantial gainful work. Your eligibility also ends if you return to substantal gainful work."

In cases where an improvement appears possible, the text of the letter notifying the claimant of an award provides in part (Award or Disallowance Notices, 8280.353):

"The evidence in your claim shows that your condition may soon improve. Therefore, we plan to get in touch with you about ————— to see if you are still eligible to receive disability benefits. To help us determine this, we may ask you to give us more information or to take a medical examination. If we find you are still disabled, your benefits will continue. But, if

In 1973, 160,627 such continuing disability investigations were made, resulting in 37,926 determinations that disability had ceased. *Staff Report* 347.[3] The principal reasons for making such investigations in particular cases are that a medical reexamination had previously been scheduled (as here),[4] an employer has

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our review shows you are no longer disabled, your benefits will be stopped.

If you return to work before we contact you or you have already returned to work when you receive this notice, you should notify us immediately. Then we can review your claim in time to prevent any incorrect payments." (Emphasis in original.)

A similar notification is sent to beneficiaries who are hospitalized at the time of the award.

[3] The detailed statistics are as follows (*Staff Report* 347):

TABLE 88.—*Continuing disability determinations, year 1973*

Why investigation was made	All cases [1]	Percent of total	Cessations	Percent of total	Continuances	Percent of total
Total	160,627	100.0	37,926	100.0	122,701	100.0
Medical re-exam diary	65,143	40.7	11,949	31.6	53,194	43.3
Trial work diary matured	9,172	5.7	7,300	19.2	1,872	1.5
Earnings posted-medical re-exam set	1,043	.6	399	1.1	644	.5
Earnings posted-medical re-exam not set	26,346	16.4	4,062	10.7	22,284	18.2
Voluntary report of return to work—medical recovery expected	7,690	4.8	4,512	11.9	3,178	2.6
Voluntary report of return to work—medical recovery not expected	20,561	2.8	4,856	12.8	15,705	12.8
Voluntary report of improvement or hospital discharge	4,869	3.0	551	1.5	4,318	3.5
Voluntary report of work stoppage	7,243	4.5	56	.1	7,187	5.9
Request for reconsideration, reopening, or higher appeal	5,367	3.3	3,380	8.9	1,987	1.6
Individual made his own payee, and other reason	10,873	6.8	624	1.6	10,249	8.4
Rehabilitation notice	2,320	1.4	237	.6	2,083	1.7

[1] Cessations and continuances.

[4] CM § 6705; DISM § 351. Future medical reexaminations are scheduled in those cases in which current medical evidence indicates that the beneficiary's disability may later cease. CM § 6705(f); DISM § 351.

reported earnings by the worker,[5] or the worker has "voluntarily" reported that his condition has improved or that he has returned to work.[6]

As we have noted, the Act requires that determinations about whether a worker is still disabled must be made in the first instance by the state agency (see pp. 19–21, *supra*). As a result, different procedures are followed at the initial stages in cases of possible medical recovery than in cases involving return to work or other causes of termination of benefits.

1. CONTINUING DISABILITY INVESTIGATIONS CONCERNING MEDICAL RECOVERY

(*a*) *Procedures prior to termination of benefits*

In cases involving possible medical recovery, as here, the investigation is made by the appropriate state agency. CM § 6705.1; DISM § 353.2.[7] The disability determination is made by a team composed of a physician and a non-medical person trained in disability evaluation, using a consulting physician who examines the worker if the team deems it necessary.

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[5] Employers are required by the Internal Revenue Code (26 U.S.C. 3101, *et seq.*) and regulations (26 C.F.R. 601.401(b)(3)) to report quarterly to the Internal Revenue Service wages paid to all employees. The Service forwards these wage reports to SSA, whose Bureau of Data Processing posts each wage earner's quarterly earnings to his Social Security account.

[6] The regulations require a disability beneficiary to notify SSA promptly if his condition improves, if he is discharged from a hospital, if he engages in any work activity, or if his earnings from work increase. 20 C.F.R. 404.1531; cf. 42 U.S.C. 408(d) and 423(d)(5).

[7] In the small number of cases (see p. 2A, *supra*, n. 3), in which a worker was scheduled for medical reexamination and SSA receives evidence of work activity, it will have the return-to-work issues developed initially by the SSA district office, pursuant to the procedures described below (see pp. 14A–17A, *infra*), before the case is forwarded to the state agency for any necessary further proceedings concerning medical recovery. DISM § 353.2.

The agency communicates with the disabled worker, typically by mail (in which case he is sent a questionnaire to be completed and returned (Pet. App. 72A–75A)), or by telephone, and asks him to furnish information concerning: his present condition, his belief as to whether he is able to return to work, any current medical restrictions, the sources of treatment for his disability, the nature and extent of any employment in the past year, and any vocational rehabilitation services he is receiving. CM § 6705.1; DISM § 353.3. The beneficiary is also invited to submit any additional information relevant to the determination of his continuing entitlement. If necessary, the SSA district office will assist the state agency in obtaining the desired information from the beneficiary. CM § 6705.1 (c); DISM § 353.3B.[8]

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[8] If a worker fails to cooperate by submitting evidence of continuation of his disability or presenting himself for a medical examination, a determination of cessation of disability may be made for that reason (20 C.F.R. 404.1539(c)), but only if (DISM § 356.1A):

"(1) a continuance issue cannot be resolved with the evidence of record, (2) efforts to have the beneficiary cooperate in obtaining the necessary evidence have been appropriate and reasonably complete but unsuccessful, and (3) the evidence indicates that in spite of such efforts the beneficiary's failure to cooperate will continue."

As outlined in DISM § 356.1, however, before making such a determination the state agency and the district office must make (and document) "every reasonable effort" to communicate with the worker personally, to secure his cooperation, and to resolve the issue on the available evidence, and must tell the beneficiary that unless he cooperates by a specified date his

Unless there is clear-cut evidence of medical recovery,[9] the state agency will attempt to obtain information from medical sources regarding the beneficiary's current condition. DISM § 353.2B. It solicits such medical information from the beneficiary's treating sources, and obtains a consultative medical examination when appropriate (such as when there is a conflict between information furnished by the beneficiary or his physician and that obtained from other sources) or necessary (such as when there is no current medical evaluation of the beneficiary). DISM § 353.4.[10]

Upon completion of its investigation of the beneficiary's current condition, the state agency tentatively determines whether the beneficiary's disability has ceased and, if so, the month in which it ceased. DISM §§ 353.2E, 353.5.

If, however, the medical evidence conflicts with the beneficiary's assessment of the severity of his impairment or the date of its cessation, before the state agency's tentative determination becomes final the beneficiary is: (1) informed of the proposed adverse

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benefits might be terminated. Similar stringent procedures apply when the worker cannot be located. DISM § 356.2. In either case, moreover, if the worker subsequently agrees to submit evidence the case will be reopened and appropriate action taken on the basis of all the evidence. DISM § 356.3.

[9] Clear-cut evidence of medical recovery is deemed to exist when a beneficiary who was scheduled for a medical reexamination returns to full-time work without any significant medical restrictions. DISM § 353.2B.

[10] The state agency is obliged to ensure that medical source evidence used to establish the absence of continuing disability is in writing, with the source properly identified. DISM § 353.4C.

action;[11] (2) given a summary of the evidence upon which it is based, followed by an opportunity for the worker or his representative[12] to review it[13] and to respond in writing in at least ten working days; and (3) given additional time (20 to 30 days) if needed to obtain and submit additional evidence in support of his claim. DISM § 353.6. Such summaries of the evidence are "tailored to individual case situations and * * * prepared in such a manner as to enable beneficiaries to understand better the reasons for cessation." DISM § 353.7A. In a substantial number of cases the beneficiaries make further submissions in response to this notice.[14]

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[11] State agencies ordinarily communicate with beneficiaries by letter, but they do occasionally call beneficiaries. Any telephone or face-to-face communications between the beneficiary and the state agency are documented in the beneficiary's file, which also includes copies of all correspondence. CM § 6705.3(d)(1).

[12] A beneficiary may be represented before SSA or the state agency by any practicing attorney or other qualified person at any stage of the entire proceedings, including the period before an initial determination is made. 20 C.F.R. 404.971–404.972. (Typical representatives include attorneys, veterans' service officers, officials of labor unions, fraternal or religious organization, as well as friends or relatives of the worker.) Such representatives may charge fees, which, pursuant to the Act and regulations may be paid by the Secretary out of past-due benefits established in the proceeding. 42 U.S.C. 406; 20 C.F.R. 404.975–404.977. See generally *Staff Report* 430–432.

[13] The beneficiary and any representative are entitled to a detailed summary, including the specific findings of the medical evidence, and are entitled to examine all other evidence. In addition, the representative is permitted to examine the actual medical evidence. However, in accordance with accepted medical practice for the protection of the doctor-patient relationship, the worker is not presently entitled to examine the medical evidence, and state agencies are instructed to use care in mentioning to the worker information in medical reports that may be embarrassing or harmful to him, such as family affairs, mental illness, and malignancies. CM § 7314. See also 20 C.F.R. 401.3(a)(2). These limitations are currently under review as part of a comprehensive study to determine the extent to which practices and policies of the Department may be affected by the recently-enacted Privacy Act of 1974, which goes into effect in September 1975. 88 Stat. 1896.

After taking into account any response by the beneficiary,[15] the state agency makes its determination. In many cases where the beneficiary makes a further submission the state agency alters its tentative determination and concludes that the worker is still disabled. If the determination remains adverse to the beneficiary, it must be supported by specific findings and conclusions. 20 C.F.R. 404.905(d). Disability will be found to have ceased as of the month in which the evidence establishes that medical recovery has occurred. 20 C.F.R. 404.1539; CM § 6708(a); DISM § 355.

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[14] No data are available about the frequency of such further submissions, nor of the frequency with which the state agencies revise their tentative determinations as a result thereof. SSA informs us, however, that in at least a substantial proportion of the cases in which the determination is disputed, further submissions are made.

[15] The state agencies generally do not interview the worker. They are not barred from doing so, however, if the worker were to so request and to go to the state agency office. If a worker does go to the state agency, or, as happens more commonly, responds to the invitation to present questions to the local SSA district office (see Pet. App. 68A), the office in question will prepare a report of the resulting interview which may include personal observations on the worker's apparent impairments (App. B, *infra*, pp. 44A–45A). Such a report is also prepared by the district office when it is requested to assist the state agency in developing the facts. DISM § 353.3B2.

The state agency forwards its determination to SSA's headquarters in Baltimore for review by a disability examiner in the Bureau of Disability Insurance. 42 U.S.C. 421(c); CM §§ 6701(b) and (c), T6262; Disability Insurance Letter No. II-46 (App. B, infra, 60A-61A); DISM § 352C.[16] The primary purpose of such review is to assure that the state agencies are consistent in applying the uniform standards contained in the state agency agreements and otherwise established by SSA. As we have noted, however, SSA may not itself revise the state agency's determination to be more favorable to the beneficiary; it may only determine that a worker is no longer disabled or that the disability ceased sooner than determined by the state agency (see p. 21, *supra*).[17] If SSA believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it can only return the file to the state agency for further development and the state agency is not obliged to revise its determination.[18]

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[16] Although previously SSA had reviewed all state agency determinations on initial applications concerning disability, in 1972 it adopted a sampling approach in which it reviews only about five percent of the determinations. *Staff Report* 27-30, 206. However, SSA still reviews all state agency determinations about whether a worker is still disabled.

[17] In practice, such cases are returned to the state for reconsideration.

As to initial claims for benefits, in 1969 SSA returned to the state agencies for substantive reasons 6.8 percent of the decisions sustaining a claim of disability. *Staff Report* 209. In 37 percent of the cases returned in the period January to June 1969, the state agencies revised their original decisions from allowance to denial, at times after obtaining additional evidence. *Id.* at 212. The rates for decisions that disability has continued would probably be comparable.

[18] In 1969, SSA returned to the states for substantive reasons 5.4 percent of the state agency decisions denying an initial

Whether it agrees or disagrees with the state agency's determination that a worker is still disabled, SSA notifies the beneficiary in writing to that effect. If the determination is adverse, the notification also informs the beneficiary of the basis for the determination and of the right (discussed at pp. 10A–11A, *infra*) to seek reconsideration. 20 C.F.R. 404.907. A decision by SSA to terminate a worker's benefits (whether based on the state agency's or its own determination of cessation of disability) constitutes an "initial determination" (20 C.F.R. 404.905(d)), as to which the beneficiary has procedural rights of review prescribed both by the Act and by regulation (see pp. 10A–14A, *infra*).

The effect of a determination that the worker is no longer disabled on payment of benefits will vary according to the circumstances. If the worker ceased to be disabled more than two months prior to the determination, the payment of benefits will terminate immediately, for the two-month post-disability grace period (see p. 16, *supra*) would have elapsed. If, however, the disability is found to have ceased near the date of the determination (as it was in respondent's case (see p. 8, *supra*)), then benefits will be paid for an additional month or two, depending upon the dates involved.

(b) *Procedures following termination of benefits.* The Act provides that upon a determination that a worker is no longer disabled the latter may within a period prescribed by the Secretary (which shall not be less than six months (42 U.S.C. 405(b)) request an evidentiary hearing, and is also entitled to judicial re-

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claim of disability. *Staff Report* 209. The states revised their original decisions from denial to allowance in 52.7 percent of the cases returned during the period January to June 1969. *Id.* at 212.

view of the Secretary's final decision pursuant to 42 U.S.C. 405(g). See 42 U.S.C. 421(d).

In addition, the Secretary has by regulation provided that beneficiaries may request reconsideration of the initial determination, even if no new evidence is to be submitted. 20 C.F.R. 404.909–404.916. A request for reconsideration may be submitted to SSA at any time within six months of the initial determination,[19] which period SSA may extend for good cause and other reasons. 20 C.F.R. 404.911; see 20 C.F.R. 404.612; 404.953. Reconsideration must be sought before there can be an evidentiary hearing. 20 C.F.R. 404.917(a). SSA informs us that in 1973, out of 34,600 initial determinations that disabilities had ceased, reconsideration was requested in only 8,800 cases (*i.e.,* 25.4 percent).

Reconsideration is initially conducted by the state agency, but usually not by the same persons that handled the case before. Dixon, *supra,* at 32. The beneficiary may submit new evidence (and he or she frequently does), and the state agency may seek a new or additional physical examination of the worker, may obtain further vocational evidence, or may otherwise update the file. *Staff Report* 239.[20] The state agency then submits its determination on reconsideration to SSA, where it is reviewed in the same manner as the state agency's original determination about whether the worker's disability had ceased (see p. 8A, *supra*). In a significant proportion of the cases in which reconsideration is sought, the state agency or SSA determines that the worker is still disabled.[21] SSA again notifies the beneficiary in writing of the determination, which, if adverse to the beneficiary, is treated as a "determination" for the purpose of the statutory right to a post-termination evidentiary hearing (see pp. 9A–10A, *supra*). 20 C.F.R. 404.917(a). This notification also informs the beneficiary of the basis for the determination and of the right to request a hearing (20 C.F.R. 404.915), such a request to be filed within six months unless the period is extended. 20 C.F.R. 404.918. SSA advises that in 1973 hearings were requested in 1,900 of the 5,600 cases (34 percent) in which, upon reconsideration it adhered to the determination that disability had ceased.[22]

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[19] The six-month period was established because, in view of the fact that reconsideration is a mandatory step before a hearing may be requested, a period shorter than six months would result in beneficiaries who did not seek reconsideration being denied the six-month period the Act prescribes for requesting a hearing. *Staff Report* 38.

[20] Most states agencies now telephone persons requesting reconsideration when a question requires resolution or when it appears that additional sources of treatment may exist. *Staff Report* 242. The state agencies do not ordinarily interview the beneficiary personally.

At the hearing, the beneficiary may submit additional or new evidence of disability, and the administrative law judge (who may also call for the presentation of additional evidence) considers the record *de novo* even if no new evidence is submitted. 20 C.F.R. 404.927. The hearing is non-adversary, and SSA is not represented by counsel or other staff. As at all prior and subsequent stages, however, the beneficiary may be represented by counsel or other representatives. 20 C.F.R. 404.934. In addition, the beneficiary may (but is not required to) appear and testify personally (*ibid.*); witnesses may be subpoenaed (20 C.F.R. 404.926); and they must ordinarily testify under oath and answer relevant questions propounded by the parties. 20 C.F.R. 404.929. SSA, however, need not proffer for confrontation and cross-examination by the beneficiary all persons who have provided the evidence underlying its determination. See *Richardson* v. *Perales, supra.*[23]

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[21] As to initial applications for benefits, in 39.5 percent of the cases in which reconsideration was requested in fiscal 1973 the result on reconsideration was favorable to the beneficiary. *Staff Report* 308–309. During the ten-year period from fiscal 1964 to 1973, this rate ranged between 29.9 percent and 39.5 percent. *Ibid.* No data are available about the reasons for different results upon reconsideration.

[22] As of April 1974, the median processing times for all disability cases (including initial applications and terminations) were 74 days for reconsiderations resulting in affirmances, 105 days for reconsiderations resulting in "reversals." *Staff Report* 238.

SSA informs us that in a substantial proportion of cases the administrative law judge concludes that the worker is still disabled or that the disability continued longer than had previously been determined; including cases in which the worker did not appear.[24]

If the judge rules adversely to the beneficiary, the latter within 60 days may request SSA's Appeal

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[23] The median processing time for all disability cases in mid-1974 was 163 days between a request for hearing and the decision. *Staff Report* 238. In addition to the time lag due to processing, as to both reconsiderations and hearings significant delays result from the beneficiaries waiting a substantial part of the six-month period to request further review, even though they are no longer receiving benefits. In cases involving initial application, the mean periods between the adverse decision and the request for further review were 60.9 days for reconsideration requests and 65.6 days for hearing requests. *Id.* at 246.

[24] In fiscal 1973, administrative law judges found for the beneficiary, in whole or in part, in 24,100 (*i.e.*, 45.3 percent) of the 53,100 cases involving initial applications for disability benefits. *Staff Report* 310–311. A study of such cases in fiscal years 1965–1968 found that the judge ruled in the beneficiaries favor in 36.4 percent of the cases in which the worker did not appear (Dixon, *supra*, at 81).

Council to exercise its discretionary authority to review the judge's decision and must do so before seeking judicial review. 20 C.F.R. 404.946.[25] The Appeals Council which engages in *de novo* review, may consider new or additional evidence (see 20 C.F.R. 404.949) and may affirm, modify or reverse the decision of the administrative law judge or may vacate that decision and remand the case to the judge for additional proceedings. 20 C.F.R. 404.950. In fiscal year 1973, the Appeals Council ruled favorably to the worker in 12.3 percent of all disability cases (initial applications and terminations) it reviewed. *Staff Report* 254.

Within 60 days of an adverse decision or denial of review by the Appeals Council, a beneficiary may institute an action in a district court seeking judicial review. 42 U.S.C. 405(g).[26] The court may not take new evidence and must accept the agency's findings of fact as conclusive if supported by substantial evidence. 42 U.S.C. 405(g).[27] In the great majority of cases the agency's decision is affirmed,[28] in which event the disappointed beneficiary is entitled to further judicial review in the same manner as with judgments in other civil actions. 42 U.S.C. 405(g).

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[25] The Appeals Council may also review a case upon its own motion (20 C.F.R. 404.941) or upon certification by an administrative law judge. 20 C.F.R. 404.942.

[26] Judicial review is available only with respect to a "final decision of the Secretary made after a hearing * * *." 42 U.S.C. 405(g).

[27] The court may remand the case to the Secretary for additional findings. 42 U.S.C. 405(g).

[28] In 1[illegible]3, in disposing of 1,217 disability cases (including both initial applications and terminations) the district courts affirmed the agency in 85 percent of the cases in which the court reached a final decision. *Staff Report* 269. The total number of such cases filed that year was 2,226, in addition to the 2,676 pending at the beginning of the year. *Ibid.*

2. CONTINUING DISABILITY INVESTIGATION CONCERNING WORK ACTIVITY

Because return-to-work cases do not necessarily or usually entail the state agency involvement mandated by the Act, the procedures prior to the post-termination evidentiary hearing stage differ from cases of possible medical recovery. Although this case does not directly challenge the return-to-work procedures, we describe them briefly so that the Court may have a more complete picture of the termination procedures.[29]

Upon receipt of information indicating work activity,[30] SSA's Bureau of Disability Insurance sends the beneficiary a questionnaire (Pet. App. 68A–71A) soliciting information about the nature and extent of the beneficiary's employment, earnings, current medical restrictions, and receipt of any vocational rehabilitation services. CM § 6705.2(b)(1); DISM § 352A.[31] The beneficiary is also invited to provide any additional information he believes important and of assistance to SSA's determination of his continuing entitlement to benefits.[32]

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[29] The work activity procedures have been revised to eliminate various roles previously played by state agencies in such cases. See Disability Insurance Letter No. II–46 (App. B, *infra*, pp. 60A–61A). Accordingly, many of the portions of the DISM in the Appendix to the petition have been superseded by the CM appended to this brief.

[30] Although no precise data are available, SSA informs us that nearly all such information derives from employers' quarterly reports of wages paid (see p. 3A, *supra*, n. 5).

[31] The form also states: "If you have any questions, or need help in filling out the form, please telephone or visit any social security office" (Pet. App. 68A).

[32] Because of the nature of the questions typically presented. in cases involving self-employment, agricultural employment, or

The Bureau reviews the beneficiary's response to the questionnaire to determine whether an issue of continuing disability is actually present. When the response is clear and complete and there is no material conflict in the evidence, the Bureau's determination of continuing entitlement will be based solely upon the work activity information reported by the beneficiary. However, when the response is inadequate or conflicts in any way with evidence indicating that the beneficiary is engaging in substantial gainful activity, or when the beneficiary fails to respond, the Bureau will have the SSA's district office [33] nearest the beneficiary communicate with him personally [34] to clarify any factual differences or misunderstandings or to solicit the desired information. CM §§ T6263, 6705.3(c)-(d); DISM § 352.A.4, B). Upon completion of this investigation, the SSA district office evaluates all the evidence and prepares a proposed determination as to the beneficiary's continuing entitlement. Disability Insurance Letter No. II-46 (App. B, *infra,* pp. 60A-61A).

Before this determination becomes final, however, in cases where the evidence conflicts in any way with the beneficiary's statements about the amount of earnings, periods of work, or date of its cessation, SSA: (1) informs the beneficiary of the proposed adverse determination (2) provides a brief summary of the evidence on which it is based and a reasonable oppor-

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voluntary report of work activity with a future medical reexamination date, the SSA district office nearest the beneficiary will, instead, personally interview him. CM § 6705.2(c).

[33] There are over 1,200 SSA district offices and branch offices. *Staff Report* 135.

[34] Any telephone or face-to-face communications by the SSA district office are documented in the beneficiary's file, which also includes copies of all correspondence. CM § 6705.3(d)(1).

tunity (at least ten working days) to respond in writing or in person to the SSA district office, and (3) upon request, gives the beneficiary additional time (20 to 30 days) to obtain and submit additional evidence in support of his claim. CM § T6273(c). As with medical recovery cases, the summary of the evidence is tailored to the individual case and is prepared so as to enable beneficiaries to understand the reasons for the determination. CM § T6273(c), (d). After taking into account any response by the beneficiary, the SSA district office then makes its determination which it forwards to the Bureau of Disability Insurance for review by a disability examiner.[35]

When the Bureau determines that disability has ceased, it so advises the beneficiary, giving the effective date of cessation. Cessation of disability because of work activity will be found to occur: (1) as of the first month after expiration of the nine-month trial work period (see p. 25, *supra*) in which the evidence establishes that the beneficiary has demonstrated a capacity to engage in substantial gainful activity; or (2) if he is not entitled to a trial work period (see p. 25, *supra,* n. 29), as of the first month in which he demonstrates a capacity to engage in substantial gainful activity. CM § 6708(b). Such an "initial determination" that disability has ceased results in termination of the payment of benefits (subject to the two-month grace period (see p. —, *supra*), and is subject to essentially the same procedures for reconsideration,[36] evidentiary hearing, Appeals Council review and judicial review that we have already discussed (see pp. 10A–14A, *supra*). According to SSA, however, in relatively fewer return-to-work cases than in medical recovery cases does the beneficiary seek these additional modes of review, perhaps because the issues in return-to-work cases admit of less difference of opinion.

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[35] When the Bureau's review reveals a material deficiency in the determination, the Bureau will either revise the determination or return the case to the district office for additional information. CM § T6275.

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[36] The reconsideration of an initial determination based upon return to work does not involve the state agency; such reconsideration is ordinarily undertaken by the district office. CM § T6266(c).

APPENDIX B

Continuing Disability—General

6700. The Obligation To Investigate Continuance of Disability.—Disability ceases when the individual's physical or mental impairment is no longer of such severity as to prevent him from engaging in SGA or, subject to the trial work period provisions, he demonstrates, by working, the ability to engage in SGA (except in certain cases based on statutory blindness).

The Administration has an obligation to terminate disability benefits and freeze periods when an individual is no longer under a disability. Events and circumstances which will result in the initiation of a continuing disability investigation are described in § 6705. The primary purpose of a continuing disability investigation (CDI) is to obtain complete, current information about the disabled individual's condition and any work activity since the last contact with him. The information is required so that an evaluator may be in a position to determine whether the individual is still under a disability.

6701. Responsibility of Various Offices.—Responsibility for identifying and developing potential continuing disability issues is shared by DO's, SA's, and BDI.

- (*a*) *District Offices.*—DO's may become aware of continuing disability issues either through a direct beneficiary contact *or* a CDI request from BDI. Most CDI's are initiated in BDI as a result of earnings postings, voluntary reports, or scheduled medical reexaminations, but there are some cases in which the beneficiary makes a report (i.e., work activity, medical improvement) directly to the DO. Irrespective of the manner in which the DO learns of a CDI issue, cases should be developed and transmitted in accordance with instructions in this chapter. (All medical evidence development is initiated by the State agency. A DO will accept medical reports voluntarily brought in by the beneficiary or submitted in his behalf, but will not request medical evidence.)

- (*b*) *State Agencies.*—Medical development of continuing disability cases is the responsibility of the SA's because they are especially equipped to obtain specific medical information in a given case and can pinpoint the development of clinical and laboratory findings in the light of evidence already in the file. After the SA obtains medical or other evidence that may be required, they prepare a determination of continuance or cessation and forward the case to BDI for review.

- (*c*) *Bureau of Disability Insurance.*—BDI examines all incoming information which raises a question of possible medical recovery or indicates an ability to work, and screens out cases in which a CDI is not required. BDI determines whether DO and/or SA action is required and also approves SA determinations or recommends further development. BDI notifies the beneficiary and the DO of the final decision.

6702. Continuing Disability Issue—General.—The issue of continuing disability will arise in two types of situations: (1) where there is a reasonable likelihood that the individual's condition may have improved, and (2) where the individual's condition has not improved but there is work activity. Future medical reexamination dates are established in those cases where the medical evidence indicates that sufficient improvement may occur to permit return to substantial gainful activity at some later time.

When a beneficiary for whom a medical reexamination diary has been established returns to work his return to work before the months the diary will fall due may be an indication of medical recovery, and justifies an immediate investigation of whether or not he has in fact recovered, without regard to the trial work period. If the State agency finds that he continues to have a disabling impairment, his case will not be investigated and evaluated again until he has worked in 9 months, or when a subsequent medical reexamination diary matures, or affirmative evidence of medical recovery is received, whichever date is earliest.

When a beneficiary for whom recovery is not likely (no medical reexamination diary has been established) returns to work, he will continue, as in the past, to work in his trial work period without reexamination of his medical condition, unless BDI or the SA receives affirmative evidence of medical recovery.

A beneficiary for whom a medical reexamination diary has been established is notified that we have scheduled a medical followup at a future date and that he should notify us if he returns to work. The notice is furnished with his award certificate in an initial case and his continuance letter after a continuing disability investigation. It is also most important that DO's always explain to the beneficiary (or in reply to general inquiries) that the trial work period continues only so long as he continues to have a disabling physical or mental impairment (see § 6703.6).

6703. Work Activity—Trial Work Period.—The law provides a trial work period without loss of benefits for persons determined to be under a disability who have not medically recovered (see § 6703.2(*c*) for exception). The individual who has not recovered medically may render "services" in as many as 9 calendar months (not necessarily consecutive) during which his work, regardless of the magnitude, will not be used as the basis for determining that disability has ceased. Not until after 9 months of services will his work be considered in determining whether he has demonstrated ability to engage in SGA. After the end of the trial work period, any such services (including the services rendered during any of the 9 months) may be considered in determining whether he is able to engage in SGA any month thereafter.

6703.1 Trial Work Period—Definition of Services.—(*a*) *General.*—The term "services" means activity in employment or self-employment which is performed for remuneration or gain or is determined to be of a type normally performed for remuneration or gain. Since the trial work provision is intended to give a disabled beneficiary the opportunity to test his ability to work and hold a job, minor work activity may generally be disregarded. Therefore, work activity in *employment* in a month will constitute "services" only if it is actually or usually performed for remuneration or gain, amounting to more than $50 either in cash or in kind. Work activity in *self-employment* will be determined to be "services" only where net earnings in a calendar month are more than $50 for a month or the self-employed person spends more than 15 hours in that month in the work activity.

In some SE cases it may not be possible to isolate from the total net earnings the net earnings for each particular month of self-employment. When this occurs after full development divide the net earnings for the particular work period by the months of self-employment to find net earnings per month. Cases where remuneration for employment is in the form of commissions should be handled in a similar manner.

● (*b*) *Activity Which Does Not Constitute "Services" for Purpose of Charging Trial Work Period Months.*—Activity performed by a beneficiary for which payment in excess of $50 a month is made does not constitute "services" if the activity, although resembling services in employment for remuneration or gain, is:

(1) part of a prescribed program of medical therapy, and

(2) carried out in a hospital under the supervision of medical and administrative staff; and

(3) is not performed in an employer-employee relationship; and

(4) is not normally performed for remuneration or gain.

See SSR 69–46 for a case illustrating activity performed under these circumstances. When appropriate, the DO will develop the question of employer-employee relationship (§§ 1200 and 4520 ff.). When forwarding cases where activity of this nature is involved, the DO will annotate the Transmittal SSA–881, "Work Therapy Plan in Hospital, no "Services" for TWP."

6703.2 When the Trial Work Period Does Not Apply.—(*a*) *Freeze Cases.*—A person entitled to a freeze only is not entitled to a trial work period. Examples of freeze only cases are:

(1) Individual is entitled to a freeze only because of railroad or military service credits that may be used toward a freeze but not toward entitlement to DIB (§ 6010).

(2) Individual is statutorily blind but is not entitled to a disability insurance benefit (§ 6060(*a*)).

(3) Individual in freeze status fails to file for DIB for some other reason.

● (*b*) *Only One Trial Work Period During a Period of Disability.*—An individual will not be entitled to more than one trial work period within the same disability period.

● (*c*) *Subsequent Period of Disability.*—If an individual's subsequent period of disability begins within 5 years after the termination of an earlier freeze or DIB, he may become entitled to DIB without serving a waiting period. In such cases the trial work period provision does not apply.

There are cases, however, where a claimant becomes reentitled to DIB within 5 years after a prior termination but he is not paid for the full number of months he is disabled. This can occur where the subsequent application is not filed until 18 or more months after the onset of the subsequent disability; since benefits can be paid retroactively for only 12 months, a beneficiary in this situation will have a period of 6 or more months after onset in which he does not receive benefits. Where a beneficiary does actually in effect serve a 6-month waiting period, he is entitled to a trial work period.

NOTE: Even though a childhood disability beneficiary does not serve a waiting period he is entitled to a trial work period if it is found he has not recovered medically when he returns to work. If a CDB later becomes simultaneously entitled to DIB on his own account number, or his CDB is terminated and he later becomes entitled to DIB on his own account number, he must serve a 6-month waiting period before he can receive DIB. He is, therefore, entitled to a trial work period as a DIB (irrespective of whether he worked in a trial work period as a CDB). This remains true even if his period of disability and his entitlement to DIB occur within 5 years of his termination of CDB.

● (*d*) *Disabled Widows, Surviving Divorced Wives and Widowers (DWB).*—A person entitled to (DWB) benefits is not entitled to a trial work period.

● (*e*) *Certain Statutorily Blind Workers Age 55–64.*—The special blindness provision ~~(§§ 6060 (*b*) and A6060~~(*c*)) in the law is applicable in cases where the individual is age 55–64 and statutorily blind. Under this special provision, disability for these individuals is defined for purposes of entitlement to disability insurance benefits as the inability by reason if such blindness to engage in SGA requiring skills or abilities comparable to those of any SGA in which he engaged prior to onset of blindness or age 55, whichever is later. Generally, the skills or abilities required in the performance of SGA after age 55 or onset of blindness, whichever is later, should be compared with those of his previous regular work.

The trial work period will not apply for an individual who is entitled by virtue of the special blindness provisions, unless:

(1) He returns to work which is comparable to the activity he engaged in during the 10 years prior to blindness or age 55, whichever is later, or

(2) His last previous work activity was termi-

nated because of impairment or other reasons related to his capacity to engage and his return to work involves a significant vocational adjustment.

6703.3 When the Trial Work Period Begins

The trial work period begins with the month in which the beneficiary has filed an application and becomes entitled to DIB or, in the case of a disabled child beneficiary who has attained the age of 18, with the month in which he attains age 18 or the month in which he becomes entitled to such benefits, whichever is later. The 9 months of trial work (whether or not such 9 months are consecutive) will be counted beginning with the first month within the trial work period in which a beneficiary, who has not recovered medically, performs services.

EXAMPLE 1: Beneficiary became entitled to DIB for 11/69 by an application filed 12/69 and begins work 3/70. The trial work period begins 12/69 and counting of trial work months begins 3/70.

EXAMPLE 2: Beneficiary became entitled to DIB in 2/71 by an application filed 1/71; his onset date is 7/15/70 and he begins work 12/70 (during the waiting period); work during the waiting period was determined to be not SGA. Trial work period and counting of months of trial work begins 2/71.

6703.4 When the Trial Work Period Ends

The trial work period ends with the 9th month in which the beneficiary has worked in the trial work period or when his disability ceased for reasons other than work (e.g., medical recovery) whichever is earlier. Therefore, the fact that most individuals are entitled to a trial work period beginning with the first month of entitlement does not mean that they are automatically entitled to 9 months of trial work.

EXAMPLE 1: Beneficiary entitled 7/69 by an application filed 7/69 (no medical reexamination established and medical recovery has not occurred); begins work in 1/70 [illegible] continues in all succeeding months. Trial work period ends with 9/70.

EXAMPLE 2: Beneficiary entitled 7/69 by an application filed 7/69 (no medical reexamination established); begins work in 6/71. In 9/71 he submits a medical report from his attending physician indicating medical improvement (i.e., affirmative evidence). Based on further medical development cessation is found 10/71 based upon medical recovery.

EXAMPLE 3: Beneficiary entitled 7/71 by an application filed 7/71 (medical reexamination established for 6/72) begins working 1/72. Evidence shows medical recovery in 1/72. Disability ceases 1/72.

6703.5 Evaluation of Work Activity After 9 Months of Trial Work

After an individual has worked in 9 months, the SA in determining whether his disability has ceased will review all medical and nonmedical factors. including the claimant's work before, during, and after the trial work period.

When the individual has demonstrated by working that he is able to engage in SGA, cessation is established as of the first month, after the end of the trial work period, in which the evidence establishes the individual is able to engage in SGA. This may be the first month after the last month in the trial work period or any subsequent month, depending on the facts in the case. It is not necessary for the individual to still be working in the month of cessation. For example, if the SA receives a case in the 9th month of work which shows that the individual stopped working in the 9th month cessation may be found in the 10th month.

6703.6 Explaining the Trial Work Period

Any time the trial work provision is being explained to a beneficiary, it should be pointed out that medical recovery will prevent a person from receiving the full benefit of the trial work provision. A beneficiary for whom a medical reexamination diary has been established will be notified that we have scheduled a medical followup at a future date (see § 6702) or he will be contacted upon release from a hospital and that he should notify us if he returns to work. It should be explained to the beneficiary that the trial work period continues only so long as he has not recovered from his medical impairment, that a prompt report must be made when he returns to work, and that we will evaluate his condition at that time to determine whether his impairment remains at a level of severity which will permit him to receive benefits in a trial work period.

6705. Circumstances Which Raise a Question of Continuing Disability

During the course of an individual's period of disability various situations occur which indicate that there is a need for a continuing disability investigation to determine whether, in fact, an issue of continuing eligibility does exist. It is the function of the DO to develop and record accurately the pertinent information leading toward resolution of the specific issue at hand. Although a comprehensive report of an individual's disability status is desirable, the type and appropriateness of development will depend upon the circumstances in each individual case. For instance, development of an isolated wage posting, in the absence of any other change in status, should not require the extensive interview required when the reason for investigation involves possible medical recovery. The techniques for conducting a continuing disability interview are much the same as those used when the beneficiary first filed application for disability benefits. Essentially, the beneficiary's allegations concerning impairment, work, and the circumstances surrounding any change in his disability status must be fully described. Any one of the following situations warrants the initiation of a continuing disability investigation.

(a) Voluntary Reports

Notices indicating that a beneficiary has improved or returned to work may be received in BDI or the DO in the form of a letter or cards designed expressly for reporting these events and issued periodically by SSA to beneficiaries.

The individual sometimes reports personally to the DO that his disability status has changed. Occasionally, information is received from persons wishing to remain anonymous. In any event, all such notices initiate the investigative procedure.

(b) Change of Address or Request for Change of Payee

When a notice is received that a disabled individual's address is being changed from a hospital to a private residence the possibility of recovery exists. The extent of development requested by BDI will depend on the facts in any one given case; however, the status of the individual's physical or mental impairment must be ascertained. In cases involving mental impairments, a change to a private residence is usually accompanied by a request for change in payee from representative payee to the beneficiary himself. The two issues, if presented, should be developed simultaneously. Instructions for payee development are contained in § 3014.

(c) Release From Hospital

Release from a hospital is usually an indication of some improvement in an individual's mental or physical condition. Not all hospitals maintain the same policy regarding the extent of improvement which would warrant release. However, when an individual is released, confinement of strict medical regimen may no longer be necessary. It is, therefore, necessary to investigate and update the beneficiary's file to aid BDI and the SA in determining whether current or future medical evaluation is desirable.

(d) Vocational Rehabilitation Notices

State Vocational Rehabilitation agencies attempt to rehabilitate those individuals who have the potential for future reemployment. These agencies are valuable sources for furnishing information relating to a beneficiary's medical or rehabilitative progress. Generally, the VR agency will notify BDI at the point in time where the individual with whom they have worked is about to, or has reached his potential for returning to the labor market. When such a notice from a VR agency is received it is regarded as warranting a continuing disability investigation.

(e) Reported Earnings

BDP maintains a control on the record of each individual for whom disability has been established. Any earnings reported for such an individual, receive a computer screening and, where necessary, are reviewed by an examiner to determine the basis for the earnings and their amount. Wage postings oftentimes represent sick pay, vacation pay, late reporting by a former employer, etc. However, they may also represent a return to employment. If, after this screening, the wage postings are not satisfactorily explained, BDI will initiate a continuing disability investigation to establish whether a beneficary's disability status has changed.

See § 6743 for explanation of earnings sheet CDI–805, the form on which BDP shows these postings, which will usually be inserted in the claims folder.

(f) Required Medical Reexamination

Medical reexamination dates are established (based on the evidence in file) in those cases where the impairment(s) is expected to improve sufficiently to enable the beneficiary to engage in substantial gainful activity. When the date of the medical reexamination is reached, BDI requests the SA to undertake an investigation to determine the status of the individual's physical and mental condition (see § 6705.1).

(g) Miscellaneous

The DO and BDI often are contacted by individuals who formerly were receiving disability benefits or were in freeze status and who request information concerning benefits. Some of these persons may have had their period of disability terminated for failure to cooperate, because their whereabouts were unknown, etc. In certain cases benefits may merely be in suspense status or as in a freeze case benefits may not have been awarded. In order to bring the claim file up to date, BDI may request a continuing disability investigation before initiating payment or reinstating benefits.

6705.1 Issues of Medical Recovery Including Medical Reexamination Diary Procedures

(a) General

Medical recovery occurs when the medical and vocational evidence establishes that the beneficiary's functional capacity has been sufficiently restored to enable him to engage in substantial gainful activity regardless of whether there has been an actual return to work. Disability ceases when medical recovery occurs, even though the beneficiary may not have used the full 9 months of a trial work period. It is, therefore, urgent that an investigation of a continuing disability issue involving a possibility of medical recovery be completed promptly, documented fully and, when it is necessary, timely suspension action be taken to prevent overpayments within the cautions set forth in § 6706.

Medical recovery issues, including matured medical reexamination diary cases, are sent by BDI directly to State agencies (SA) for development and adjudication. The SA contacts the beneficiary to determine his current treatment sources and his opinion as to his medical condition and its effect on his ability to work. When the contact is by mail, the beneficiary is asked to complete Form SSA–454(a) (Social Security Disability Beneficiary Report). When the contact is by telephone, the SA completes Form SSA–454(a), records the name of the individual supplying the information, and secures written confirmation. It then obtains whatever medical documentation is needed by contacting the beneficiary's medical sources and, if necessary, independent sources for the facts concerning the beneficiary's current medical condition.

When the medical evidence conflicts *in any way* with the beneficiary's assessment about the severity of his impairment, or about the date of cessation of such impairment, the SA again contacts the beneficiary before requesting suspension or preparing a determination of cessation. It informs him of the proposed suspension or cessation, the reasons therefor, and his right to rebut the proposed action. After the beneficiary has had the opportunity to submit rebuttal evidence and/or all conflicts are resolved, a determination is prepared and the file is forwarded to BDI. There are two instances in which the DO will become involved: (1) when the SA requires DO assistance (subsection (*c*) below), and (2) when the beneficiary feels he needs help and calls or visits the DO (see Subsection (*b*) below).

(b) Beneficiary Requests DO Assistance

(1) SA CONTACT IS BY MAIL

Form SSA–454(a) contains the statement—"If you have any questions, or need help in filling out the questionnaire, please telephone or visit any social security office." Hence, when the beneficiary contacts the DO for assistance, the DO should provide whatever assistance is needed to complete this form. If a beneficiary comes to the DO without this form, the DO should utilize Form SSA–454 (Report of Continuing Disability Interview (see § 6749)) and, if needed, Form SSA–821 (Work Activity Report) (see § 6748). Upon completion forward all material to the SA. (Note: Form SSA–454(a) (see § 6746) will *not* be stocked for DO use in conducting a CDI.)

(2) SA CONTACT IS BY TELEPHONE

When the SA contact with the beneficiary is by telephone, Form SSA–454(a) is used to record all pertinent information obtained. The SA then sends the completed form to the beneficiary for his review, signature and return to the SA. If the beneficiary comes to the DO with Form SSA–454(a) (or other communication) completed by the SA, it may be that he does not understand the issue, the intent and/or the need for furnishing the information to the SA. There may also have been a misunderstanding in the recording of certain information. It is therefore necessary for the DO (1) to review the responses entered on Form SSA–454(a), (2) to assist in answering any questions, and (3) to clarify any possible misunderstanding. If the beneficiary objects to signing the form, the DO will obtain a statement outlining the beneficiary's objections and prepare an RC to record the interview. Upon completion, forward all material to the SA.

(c) Referral of Cases by the State Agency

When the beneficiary does not respond to the State agency inquiry, or if his responses are inadequate or illegible, and in other instances where additional information is needed, the State agency may request assistance from the district office. These requests may include cases in which development on the Form SSA–401 (Medical History and Disability Report) was curtailed when the initial application was filed, and the State agency is unable to obtain the needed documentation, or when the completed questionnaire reveals that the beneficiary has worked and this factor needs additional documentation.

When a State agency requests assistance from a DO, the Form SSA–883 (Request for Field Investigation of Continuing Disability) will usually contain an appropriately detailed explanation. If the State agency does not specify the exact development needed or the needed evidence is not clearly apparent to the district office, the district office should complete a Form SSA–454 (Report of Continuing Disability Interview) and/or a Form SSA–821 (Work Activity Report) as is customary under § 6732. Upon completion of the necessary action, the file should be returned to the State agency. When the district office cannot locate the beneficiary or he refuses to cooperate, document the file and process in accordance with §§ 6736.4 and 6736.5.

6705.2 Continuing Disability Investigations —Work Activity

(a) General

One of the principal goals of the Social Security Administration is to assure that beneficiaries get their monthly checks without delay or interruption so long as they continue to be eligible for such benefits. When benefits are no longer due, payments must be stopped as promptly as practicable, but *only* when consistent with the objective of affording the beneficiary "due process." Hence, it is essential that prior to any action to stop disability benefit payments, the beneficiary (or his representative payee) (1) must be given a meaningful pre-determination notice of any adverse action to be taken and the basis for the action, (2) must have an opportunity to present any additional information or evidence that he feels may have a bearing on the proposed decision, and (3) subsequently, when a formal determination is effectuated, must be given written notice of the determination (including the rationale) and informed of his rights to relief and appeal under the law.

(b) BDI Development and Review of Evidence

(1) DIRECT MAIL CONTACT WITH BENEFICIARY BY BDI

Cases involving work activity are generally identified by BDI and developed directly with the beneficiary (or payee) by means of a letter-questionnaire. In some instances the DO is the first to become aware of information or evidence which requires a continuing disability investigation (see § 6705). In cases where the issue is identified by BDI, BDI mails Form SSA–821(a) (Report of Work Activity—Continuing Disability) (see § 6747) to the beneficiary for completion and requests that the beneficiary return the form directly to BDI. A postage-free envelope pre-addressed to BDI is enclosed for this purpose. The letter-questionnaire informs the beneficiary that the information he submits will be used to determine his continuing entitlement and, if it is determined that he is no longer entitled, benefits will cease. The questionnaire solicits details regarding any recent work activity. It also asks about current medical restrictions and invites the beneficiary to submit any additional information or statements that he believes are important in deciding his continuing entitlement.

This development technique is used by BDI (1) in all instances where a trial work period (TWP) diary date matures, (2) when unexplained postings are reported to a beneficiary's earnings record, (3) in most instances where a beneficiary voluntarily reports a return to work, (4) when a notice is received that the beneficiary has successfully completed a VR training program, and (5) in any other situation not listed as an exclusion (see subsection (*c*) below).

Suspension action will not be taken until the beneficiary has been notified of the proposed suspension, the information and evidence upon which it is based, and given an opportunity to submit rebuttal information and evidence. Moreover, when the evidence materially conflicts *in any way* with the beneficiary's assessment about his engaging in SGA, the proposed date of cessation, entitlement to a trial work period, or where evidence is received from a 3rd party (e.g., employer), the beneficiary must be contacted by the DO to resolve the conflict (or to confirm 3rd party evidence) before "due process" is satisfied and a cessation determination can be prepared by the SA (§ 6705.3(*c*)).

(2) BDI REVIEW AFTER INITIAL DEVELOPMENT

When Form SSA–821(a) is returned by the beneficiary, BDI will review the response to first determine whether an issue of continuing disability is actually present. Certain situations, e.g., (1) the beneficiary is entitled to additional months of a TWP, (2) posted or reported earnings represent sick or vacation pay or are otherwise determined *not* to represent actual work, or (3) earnings are clearly below the SGA level, are disposed of as "no issue" cases and notification is sent by BDI to the beneficiary that benefits are continued. Cases where a substantive issue is present will be sent by BDI to the SA for adjudication. When Form SSA–821(a) is not returned by the beneficiary or is returned and the responses are inadequate or the information submitted creates a conflict, BDI will request assistance from the DO (see § 6705.3).

(c) DO Development and Review of Evidence—Complex Work Issues

Because of special developmental requirements, the following categories of work issues will not be developed by direct mail by BDI: (1) self-employment work activity cases, (2) agricultural employment cases, and (3) voluntary reports of work activity before a medical reexamination diary has matured.

In these situations, BDI will forward the folder to the DO to conduct a personal interview (either by telephone or face-to-face) with the beneficiary and complete Form SSA–821. The DO will clearly explain to the beneficiary that his benefit payments may be stopped as a result of this investigation, and that he has the right to submit any evidence or make any statements he desires to be considered. If the beneficiary wishes to make any statements, use Form SSA–795 (Statement of Claimant or Other Person). If the beneficiary desires to submit additional evidence, ascertain what evidence is to be obtained, whether the DO can be of assistance in obtaining the evidence, and where necessary, allow the beneficiary a reasonable period of time (e.g., 10 to 20 days) to gather and present any evidence. The DO should control the case, follow-up to assure the timely receipt of the beneficiary's evidence and annotate the file accordingly.

In all cases the DO will enter in the remarks section of Form SSA–821 (or on an RC), the following statement—"The Beneficiary was informed on ____________ (give date) that this investigation may result in his benefits being stopped and he has been given the opportunity to submit evidence and make any statement on his behalf." The DO will follow the instructions in §§ 6705.3 for subsequent processing.

6705.3 District Office Responsibilities—Work Activity

(a) General

While the majority of CDI's involving work issues will be sent by BDI (following development) directly to the SA for adjudication or handled as "no issue" cases by BDI, in certain cases the DO will be required to develop evidence in greater detail or to clarify conflicts in the existing evidence.

(b) Request for Assistance From the Beneficiary

As indicated in § 6705.2, BDI sends the beneficiary a questionnaire on work activity (Form SSA–821(*a*)). The form advises the beneficiary to call or visit his Social Security office if he has any questions or difficulty in completing the questionnaire. In the event a beneficiary does call or visit regarding the questionnaire, the DO will give him all the assistance he requires, including assistance in completing the Form SSA–821(a).

If the beneficiary comes to the DO without Form SSA–821(a), the DO will complete Form SSA–821, following the procedures in § 6712, and forward the material to BDI. Also, where it is apparent to the DO that the evidence presented by the beneficiary will result in termination of benefits, the DO should explain this to the beneficiary to prepare him for the subsequent check stoppage. The DO will document the file with an RC. (If a beneficiary reports by mail (i.e., Form SSA–612 or letter) or by telephone that he has returned to work, acknowledge receipt of the information (send a replacement Form SSA–612 when necessary) and ~~forward to BDI for initiation of a CDI.)~~

[Process per § 6730 ff. if the reported event raises a CD issue, otherwise, forward to BDI for disposition].

(c) Request for Assistance from BDI

The following types of cases will be sent to DO's for their assistance in resolving work issues.

(1) BENEFICIARY DOES NOT RESPOND TO QUESTIONNAIRE

Where the beneficiary does not respond to the questionnaire within 45 days, BDI will send the case folder and a new SSA–821(a) to the DO with a request to contact the beneficiary and assist him in completing the questionnaire. Upon completion of the questionnaire, (see following subsections for development techniques)the DO should mail the completed form and other evidence to BDI or SA immediately (see subsection (*e*) below).

Should contact with the beneficiary reveal that he has already mailed the questionnaire to BDI, the case folder should be immediately returned to BDI with the notation "Beneficiary mailed SSA-821(a)to BDI on _______________ (give date, if available)."

(2) BENEFICIARY'S ANSWERS TO THE QUESTIONNAIRE ARE INCOMPLETE OR INADEQUATE

Where the beneficiary's answers to the questionnaire are considered incomplete, inadequate or illegible, BDI will send the case folder to the DO explaining what development is needed. When interviewing the beneficiary, the DO will explain why additional evidence is being obtained. The case should then be processed in accordance with the instruction in subsection (*e*) below.

(*d*) *Need for DO To Resolve Conflicts*

(1) BENEFICIARY'S ANSWERS CREATE A CONFLICT IN THE FACTS

When the evidence points to a cessation but a material conflict arises from the beneficiary's answers on form SSA-821(a) (or other evidence), BDI will forward the folder and other evidence to the DO to contact the beneficiary and to resolve conflicting facts. The DO should inform the beneficiary by mail (or personal contact) of the conflicting statements. Copies of all correspondence sent the beneficiary must be included in the file. When an oral contact is made, the DO must fully document its file to show the reason for the contact and the results of the interview. Include in the file any additional information or evidence submitted by the beneficiary.

Also, where it appears clear that a cessation of benefits will result, the district office should advise the beneficiary of the reasons why such action may be required, and if necessary, explain to him the pertinent provisions of the law. The DO should document the file accordingly (see (2) below where there is a misunderstanding of disability policy). See § 6706(f) for due process requisites prior to suspension.

(2) CONFLICTS OF UNDERSTANDING

Where there is a conflict of understanding (e.g., it is evident that the beneficiary does not understand SSA policies) or of the legal significance of the facts (e.g., beneficiary states on form SSA-821 (a) that he does not believe facts justify termination of benefits), the DO will be required to contact the beneficiary in an effort to resolve the misunderstanding. The DO should explain to the beneficiary the rules in question and the significance of the facts, how they are applicable to his case, and that the rules or facts may result in the termination of his benefits.

Reference to the "Rights and Responsibilities" booklets and other informational material available should be made by the DO. The DO should always document the file fully with an RC and where the beneficiary desires to make a statement, it should be recorded on form SSA-795.

(3) EVIDENCE FROM THIRD PARTY

When evidence in support of a cessation is not received from the beneficiary himself or from the the payee, the beneficiary or payee should be advised of the evidence received and given the opportunity to object if he believes the evidence is not correct. When the beneficiary is in disagreement with the evidence, the DO should provide whatever assistance the beneficiary needs to obtain additional evidence.

(*e*) *Routing Procedures*

The following routing procedures should be followed by the DO.

(1) FORWARD FOLDER TO SA

The DO has the folder when it finds that the beneficiary completed or is not entitled to a trial work period and his earnings average more than $140 per month.

(2) FORWARD FOLDER AND/OR CD EVIDENCE TO BDI

All instances where the beneficiary visits the DO for help in completing the questionnaire *and* association of the Form SSA-821(a) or Form SSA-821 with the case folder is required.

Folder is in the DO when the DO finds that there is no issue; e.g., (1) the beneficiary's earnings average $140 or less per month and it is clear his work is not comparable to that of unimpaired workers in his community engaged in similar occupations as their means of livelihood (§ 6411), *or* (2) the beneficiary has *not* completed his TWP or (3) earnings-postings represent sick, vacation or other special pay.

~~mailing of Form SSA–821(a), the beneficiary must be notified about the information which prompted the proposal before any suspension occurs.~~

~~If suspension seems proper but the beneficiary has not been given advance notice or an opportunity to submit rebuttal evidence, BDI will send the case folder to the DO without suspending benefits. The DO will be requested to contact the beneficiary, explain the purpose of the information being sought and have him complete the necessary forms (see §§ 6710 ff). Where the folder is to be sent to the SA, the DO should request suspension of benefits after complying with §§ 6707 and 6716. The due process requirements for notice and opportunity to submit rebuttal evidence are not satisfied just because, in the course of SSA's investigation, the beneficiary was informed of the *possibility* that information in SSA files might warrant a suspension (see § 6707).~~

6707. District Office Notice to Beneficiary of Proposed Suspension Action

(a) General

Before requesting BDI to suspend benefits (see § 6706) the DO should (1) inform the beneficiary (or payee) of the proposed suspension action, (2) provide him with a brief summary of the evidence on which the proposed suspension action is predicated, and (3) give the benfieciary a reasonable opportunity (e.g., 10 working days) to respond in writing if he desires. If the beneficiary desires to obtain additional evidence which he believes may be material in support of his claim to continued benefits and needs more time, he may be granted an additional period of time (e.g., 20-30 days) to present such evidence. The DO should establish controls and, depending on the individual case situation, follow up at the appropriate time.

The above notice will usually be given in person at the time the beneficiary provided the information that establishes a basis of a determination of cessation. When the information was not provided during a personal contact, the DO will telephone the beneficiary or contact him by mail. Documentation is required: a copy of the letter (see subsection (*b*) below) if a mail contact is necessary, or an RC when contact is in person or by telephone. Do not delay forwarding a folder when the beneficiary clearly understands the reasons for suspension and his right to submit rebuttal evidence, offers no objection to the proposed suspension, and the report on which the suspension is based was submitted by the beneficiary (or his representative payee, if he has one).

(b) Mail Contact With Beneficiary Necessary

Where the DO has evidence sufficient to recommend suspension (see subsection (*a*) above) and a mail contact is necessary, the letter (in addition to advising the beneficiary of the proposed suspension action and the reasons) should conclude with a paragraph along the following lines: "If you have any additional information you want us to consider, please let us know immediately, using the enclosed envelope. A reasonable amount of time will be granted, if necessary, for you to obtain and submit additional evidence. If we do not hear from you within 10 days, we will recommend that benefits be suspended." The DO will enclose a self addressed, postage-free return envelope for the beneficiary's response. When the beneficiary does not respond within 15 days or makes it known that he has no additional evidence to submit, request BDI to suspend benefits (see § 6706(*d*) above), attach Form SSA–529 (see § 6716), and forward folder to SA or BDI, as appropriate. (If the DO does not have folder, forward material to BDI.)

6708. Cessation of Disability

Cessation of disability will be found effective with the earliest month in which one of the following applies:

(a) Medical Recovery

In the month medical recovery is established by the medical evidence.

(b) SGA—Medical Recovery Not An Issue

If medical recovery is not an issue, cessation will be found effective as of the first month after 9 months of trial work in which the individual is able to engage in SGA. It is not necessary for the beneficiary to be engaging in SGA or still working in the month of cessation. For example, if an individual stopped working in the ninth month of his TWP for reasons not related to his impairment, cessation may still be found in the 10th month if his work activity during the completed TWP *clearly* demonstrated a continuing ability to engage in SGA. If the TWP does not apply (e.g., DWB, freeze only, no waiting period cases), cessation will be found effective as of the first month in which the individual engages in SGA, or if he previously completed 9 months of his TWP, as of the month he returns to work which is SGA.

6709. Termination of Benefits

Disability benefits are payable, and the period of disability continues, for the month in which the disability has ceased and for the two succeeding months. Thus the month of cessation of disability and the month of termination of benefits or of the period of disability are different. For example, a beneficiary (entitled to a TWP) could work for a period of 9 months with cessation in the 10th month, and receive benefits for the 10th, 11th and 12th months. Even if the cessation is based on reasons other than engaging in SGA (e.g., medical recovery), the beneficiary (and any auxiliary beneficiaries) is entitled to receive benefits for the month in which disability ceased plus two additional months.

COMPLETION OF CONTINUING DISABILITY FORMS

6710. Form SSA–454—(Report of Continuing Disability Interview)

(a) General

Form SSA–454 (Report of Continuing Disability Interview) has been designed to aid the interviewer in securing and reporting information about changes in and treatment of the beneficiary's condition, as well as the effect the impairment continues to have on his ability to perform SGA. The information obtained should describe what changes, if any, have occurred since the last interview in which this type of information was obtained. Space is provided on the Form SSA–454 to record the interview. It is a self-contained report of the interview. (See § 6749.)

If any section of the Form SSA–454 does not provide sufficient space to record the interview, a Report of Contact should be used as a continuation sheet.

The following describes each section in the form SSA–454.

(b) Section I—Medical Care and Treatment

This section is designed to elicit from the beneficiary a complete description of all medical care and treatment since the initial interview (or most recent CDI) description of the beneficiary's medical history was obtained. He should be asked to relate the information in his own terms and in chronological sequence.

The question at the top of this section should be checked, "No," only if the beneficiary has not contacted some medical source (hospital, clinic, laboratory, physician). If any medical source has seen, treated, examined, or "checked-up" on the beneficiary's condition, that source should be identified in the space provided. This identification should include (*a*) the full name, address, and, where possible, telephone number of the source, and (*b*) approximately how frequently the beneficiary was seen, with dates, if known, e.g., once a week since September 1971.

Additionally, a narrative description of the beneficiary's current treatment and/or limitations placed on him by the physician should be given.

Example: "On the advice of his doctor, the beneficiary spends 1 hour each morning with his left hand and wrist in hot paraffin. Once a week Dr. Smith gives him a cortisone shot."

NOTE: Any period of home confinement since the last application or continuing disability interview should also be described. The beginning and ending date of each period of home confinement should be noted along with a description of the condition that caused the confinement.

(c) Section II—Progression of Condition

The information to be recorded in this section should describe the changes in the beneficiary's condition since the last interview in terms of symptoms, physical limitations, and activities. If there has been no change it is only necessary to check the "No" block at the top of this section. However, if there has been any change, a "Yes" check should be made and a full description recorded, e.g., increases or decreases in symptoms should be described in terms of the type of change (frequency, severity, precipitating factors) and the dates when the changes occurred.

(d) Section III—Current Condition

A description of how the beneficiary's condition currently interferes with his ability to work should be recorded in this section. (When Form SSA–821 is obtained, this section need not be completed.)

Example: "Beneficiary states that both of his hands are so weak, painful, and stiff that he is unable to pick up and hold the nails, or grasp and swing a hammer with strength. He also stated he cannot carry the bundles and rolls of materials that are required of a roofer, his sole occupation for the last 22 years."

(e) Section IV—Daily Activities

This section should describe, in specific terms, the activities of a typical day and the limitations,

necessary correct [illegible] current noncreditable post
per §§ 1114 ff.]

special pay (e.g., sick pay, vacation pay, back pay, or bonus). Instead, record on an RC complete information identifying and explaining the payment. Complete item III of the SSA-881 and write in Remarks "Posted Earnings Do Not Represent Pay for Work," and forward with all material to BDI.

In cases where suspension is requested as in (*b*)(1) and (*c*)(1) above, request suspension by wire and complete item III of the SSA-881 including the date the action was taken. Forward all material with the case folder to the SA. If you do not have the case folder, request suspension by SSA-725, complete item III of the SSA-881A, and send all material with the SSA-725 to BDI.

6736. Special Continuing Disability Situations.—The following listing of special continuing disability situations (§§ 6736.1–6736.8) provides instructions which supplement and in some cases supersede those instructions in §§ 6732 and 6734.

6736.1 Disabled Individual Deceased.—Record the information in Item IA on the SSA-881 showing the date of death. Send the material to BDI.

6736.2 Individual Is Hospitalized.—(*a*) *No work.*—If the individual is hospitalized and has done no work, complete Item IB of the SSA-881 and return to BDI.

● (*b*) *Work less than 9 months.*—If the individual is hospitalized and the CD issue arose because of work activity and the individual has worked in less than 9 months of his TWP, complete Item IB of the SSA-881A and write, "Currently hospitalized" in the Remarks section or complete Items IB and ID of the SSA-881. Return to BDI.

● (*c*) *Worked 9 or more months or not entitled to a TWP.*—If the individual is hospitalized and the CD issue arose because of work or he is not entitled to a TWP, a personal contact should be made except when (1) the individual is confined in a hospital or institution for the criminally insane, or (2) the hospital feels that the contact would be detrimental to the individual's health. In this situation, try to obtain the information from the employer or an interested party. Complete an SSA-821(s) and Item IIE of the SSA-831 or Item IID of the SSA-881A. Insert in the remarks section of these forms, "Currently Hospitalized." Forward all material with the case folder to the State agency. If you do not have the case folder, send the material to BDI.

NOTE: Full development per § 6732 should be obtained if the person has been discharged, or is on a trial visit (e.g., convalescent status, parole, family care, foster care, community residence). Nursing homes, county homes, VA domiciliary centers, etc., are not hospitals in this context.

6736.3 Cases Involving Mental Illness.—When a disabled individual has been released from the hospital in the custody of another person, obtain the information required in § 6732 from the custodian. When the disabled individual has been released in his own custody, the DO may ask the hospital if it would be preferable to contact a relative or friend instead of the individual himself.

6736.4 Failure To Cooperate.—There may be instances where an individual does not furnish information about work activity, medical treatment, etc., or otherwise fails to cooperate with efforts of the DO to complete a continuing disability interview. When this situation arises, assume that the individual is unable rather than unwilling to cooperate since his failure to cooperate may be due to the nature of his impairment or a restriction resulting from the impairment or for other good cause. Consequently, all reasonable effort should be extended in every case requiring a continuing disability investigation.

When a beneficiary fails to comply with a written request for information, personal contact should be attempted. If the DO is unable to get in touch with the individual by telephone, a home visit should be made. In either event, an explanation that his failure to cooperate by a specific date (generally 2 weeks should be specified from the last contact, whether it be by personal interview, telephone, or when these are not possible by a letter) may result in the termination of his benefits will be transmitted to the beneficiary, either orally or in writing. If a mental condition is involved, it may be more prudent to contact relatives, friends, neighbors, or employers for assistance in obtaining the desired information. Sometimes members of the clergy are helpful. Where auxiliary benefits are being paid, the auxiliaries should be contacted, told of the need for cooperation on the part of the beneficiary and of the likelihood that all benefits may be terminated because of his failure to cooperate. When these efforts to obtain the beneficiary's cooperation are unsuccessful, request BDI to suspend all benefits (see § 6716).

It may occasionally be impractical for the DO to interview the individual within a reasonable period; if the DO cannot make personal contact within 45 days after receipt, the request for a CDI should be returned to BDI with a report of contact explaining why a personal interview was not conducted. Where it appears likely that contact will be made shortly after the 45-day period, retain the file and proceed with the investigation (e.g., a cooperative individual agrees to met the DO representative at the contact station on the next visit which will fall on the 55th day). In the event a personal contact is not possible and the request is returned to BDI, any information obtained about the individual's activities or condition should accompany the file. During efforts to contact an individual, for example, the DO may receive information from relatives, employers, etc., which will enable BDI (or the SA) to make a determination or to suggest a specific type of development. All efforts to communicate with the individual or to have him cooperate, including any explanations given the individual of the effect of his refusal to cooperate, should be fully recorded on dated Reports of Contact. Copies of all correspondence should also be made a part of the file. The accuracy and completeness of the DO development is vital not only as an aid in any further pursuit of the existing issue but because this may serve as the evidence on which a determination as to continuance or cessation of disability may be made.

Upon completion of all necessary DO development and action, complete item III of the SSA-881A and write "failure to cooperate" in the remarks section, or complete Items IID and III of the SSA-881, attach the RC and forward all material with case folder to the State agency. If the case folder was not sent to the DO, send all the material to BDI for association with the folder.

6736.5 Whereabouts Unknown.—When the beneficiary cannot be located at his last known address and his new address is not readily ascertained, e.g., mail is returned undeliverable, the DO should contact the postmaster with Form SSA-7001 (Postal Card Requesting Address From Postmaster) in an attempt to ascertain the beneficiary's current address. If this effort is unproductive, a personal visit should be made to the beneficiary's last known address. Individual's in the immediate neighborhood—landlord, merchants, neighbors—may have knowledge of the beneficiary's whereabouts. Where auxiliary benefits are being paid, the auxiliaries should be contacted.

Occasionally, individuals with histories of institutionalization for mental or emotional problems can be located through those institutions, even in those situations where the institution had previously given notice of the individual's elopement. Where there are wage postings in the recent past, the beneficiary may be located through the employer (identified by BDPA upon request).

All efforts made to locate the individual should be fully recorded on dated Reports of Contact. If, after exhausting all reasonable efforts, the individual still cannot be located, complete items IID and III of the SSA-881 or item III of the SSA-881A and write "whereabouts unknown" in the remarks section, attach the Reports of Contact and forward the material and/or folder to BDI without requesting suspension. Upon receipt, BDI will take whatever further action may be appropriate, including suspension of benefits.

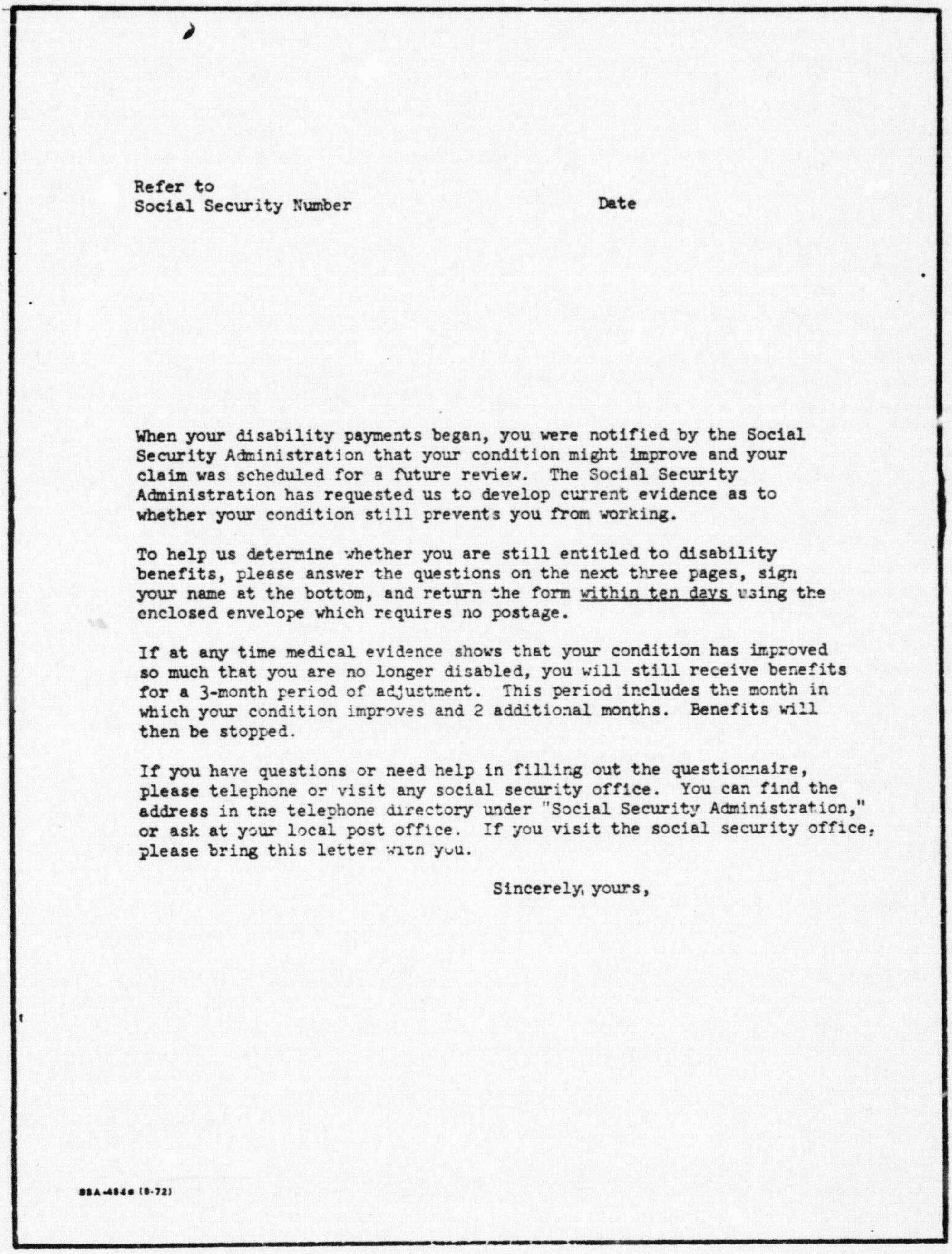
~~see §~~ 6,6-0ff

6736.6 Report of Disability Interview Limited at Initial Application.—In some cases BDI will request the DO to obtain information about an individual's work history because such evidence is not in file, e.g., the initial report of disability interview was limited because the individual was hospitalized, house-confined, etc. This information will be requested by a check in block 6. a. under remarks on the SSA-881, or by narrative remarks and should be provided in the Vocational Description section of form SSA-401 in addition to the usual CDI development.

6736.7 Beneficiary Wishes To Return Check(s) or Requests Suspension of Benefits.—When a beneficiary wishes to return a check or requests suspension of benefits to which he is entitled (e.g., an individual with an impairment for which medical recovery is not expected and while entitled to a TWP returns to work), find out why he requests such action. If it is clear that he nevertheless is entitled, explain to him that he is entitled to the check. If, after the explanation, he still wishes to return the check or have his benefits suspended, comply with his request. (See §§ 5710 ff. and 6716.) In any case, the DO should initiate a continuing disability investigation. (See §§ 6730 ff.)

6736.8 Participation in Vocational Rehabilitation. — In each CDI the DO will ascertain whether the beneficiary is known to a State Vocational Rehabilitation Agency. In those cases where the beneficiary is being considered for or receiving services from or through the agency, the name and address of the counsel or office servicing him, as

6746. Form SSA–454(a) (Social Security Disability Beneficiary Report) (See § 6705.1)



Refer to
Social Security Number

Date

When your disability payments began, you were notified by the Social Security Administration that your condition might improve and your claim was scheduled for a future review. The Social Security Administration has requested us to develop current evidence as to whether your condition still prevents you from working.

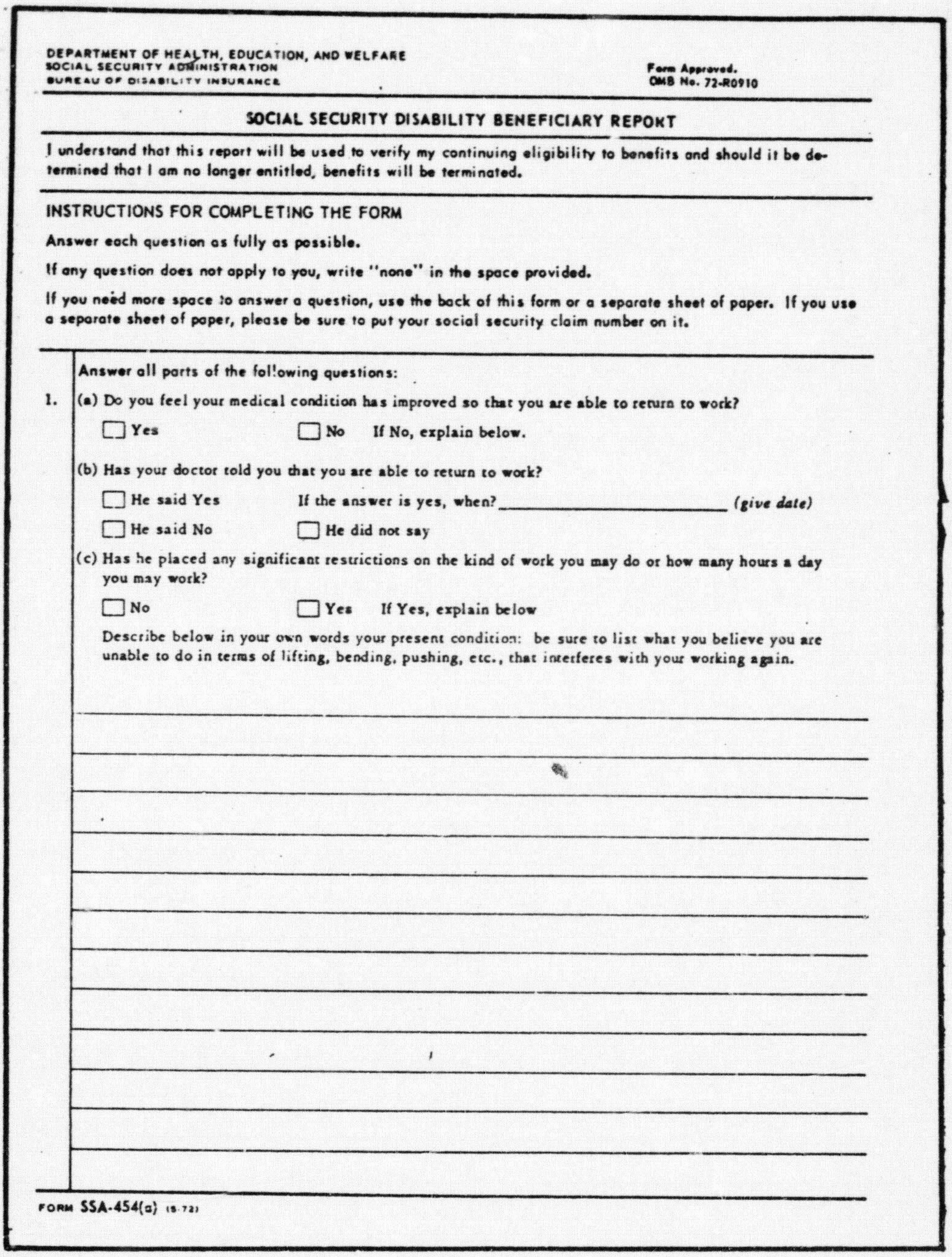
To help us determine whether you are still entitled to disability benefits, please answer the questions on the next three pages, sign your name at the bottom, and return the form within ten days using the enclosed envelope which requires no postage.

If at any time medical evidence shows that your condition has improved so much that you are no longer disabled, you will still receive benefits for a 3-month period of adjustment. This period includes the month in which your condition improves and 2 additional months. Benefits will then be stopped.

If you have questions or need help in filling out the questionnaire, please telephone or visit any social security office. You can find the address in the telephone directory under "Social Security Administration," or ask at your local post office. If you visit the social security office, please bring this letter with you.

Sincerely, yours,

SSA-454a (8-72)



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF DISABILITY INSURANCE

Form Approved.
OMB No. 72-R0910

SOCIAL SECURITY DISABILITY BENEFICIARY REPORT

I understand that this report will be used to verify my continuing eligibility to benefits and should it be determined that I am no longer entitled, benefits will be terminated.

INSTRUCTIONS FOR COMPLETING THE FORM

Answer each question as fully as possible.

If any question does not apply to you, write "none" in the space provided.

If you need more space to answer a question, use the back of this form or a separate sheet of paper. If you use a separate sheet of paper, please be sure to put your social security claim number on it.

Answer all parts of the following questions:

1. (a) Do you feel your medical condition has improved so that you are able to return to work?

☐ Yes ☐ No If No, explain below.

(b) Has your doctor told you that you are able to return to work?

☐ He said Yes If the answer is yes, when? ____________________ *(give date)*

☐ He said No ☐ He did not say

(c) Has he placed any significant restrictions on the kind of work you may do or how many hours a day you may work?

☐ No ☐ Yes If Yes, explain below

Describe below in your own words your present condition: be sure to list what you believe you are unable to do in terms of lifting, bending, pushing, etc., that interferes with your working again.

FORM SSA-454(a) (5-72)

1

2. Give name, address and telephone number of your physician(s) and of the hospital or clinic where you have received treatment for the condition that prevented you from working.

(a) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER
(b) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER
(c) NAME OF PHYSICIAN, HOSPITAL OR CLINIC	DATE LAST TREATED
ADDRESS	TELEPHONE NUMBER

3. Have you worked in the past 12 months?

☐ No ☐ Yes *If "Yes," be sure to complete all of the following items.*

(a) NAME, ADDRESS AND TELEPHONE NUMBER OF EMPLOYER			(b) KIND OF WORK DONE	
(c) WHEN STARTED *(Date)*	(d) AVERAGE HOURS WORKED		(e) AVG. GROSS EARNINGS *(Before payroll deduct.)*	
	PER DAY	PER WEEK	PER DAY	PER WEEK

(f) ARE YOU STILL WORKING?

☐ Yes ☐ No *If "No," explain below why and give date you stopped working.*

4. (a) Are you receiving services from or through the State vocational rehabilitation agency?

☐ No ☐ Yes *If "Yes," answer question (b)*

(b) Name and address of servicing rehabilitation office and counselor.

5. **Remarks:** Enter here any additional information that you believe is important and will assist in the review of your continuing entitlement to social security disability benefits. *(If you need more space, use a separate sheet of paper. Also, if you wish, you may attach any evidence that shows your current condition.)*

6. Do you authorize any physician, hospital, agency, or other organization to disclose to the Social Security Administration or to the State agency that may review your entitlement for continuing disability benefits, any medical records or other information about your disability? ☐ Yes ☐ No

I certify that the above statements are true, correct, and complete to the best of my knowledge. I know that anyone who fraudulently conceals or fails to report a disqualifying event or who makes a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act could be subject to a fine or imprisonment or both.

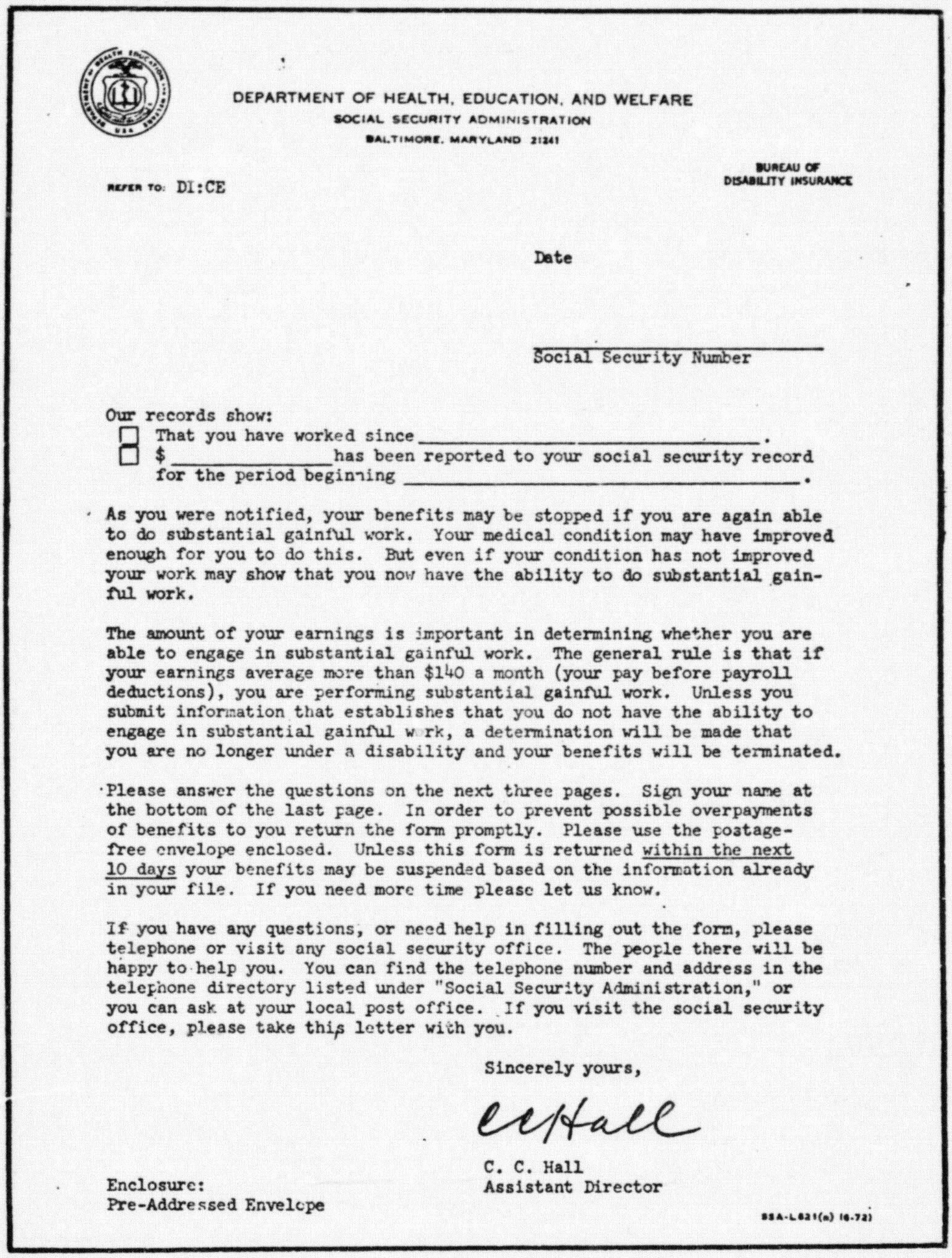
SIGN YOUR NAME AS YOU USUALLY WRITE IT	DATE	PHONE NUMBER

If the address shown on page one of this form is incorrect or incomplete please enter your present address below

NUMBER AND STREET, APARTMENT NO., P.O. BOX, OR RURAL ROUTE

CITY	STATE	ZIP CODE

6747. Form SSA-821(a) (Report of Work Activity—Continuing Disability)



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND 21241

REFER TO: DI:CE

BUREAU OF
DISABILITY INSURANCE

Date

____
Social Security Number

Our records show:
☐ That you have worked since ______________________________.
☐ $ ______________ has been reported to your social security record for the period beginning ______________________________.

As you were notified, your benefits may be stopped if you are again able to do substantial gainful work. Your medical condition may have improved enough for you to do this. But even if your condition has not improved your work may show that you now have the ability to do substantial gainful work.

The amount of your earnings is important in determining whether you are able to engage in substantial gainful work. The general rule is that if your earnings average more than $140 a month (your pay before payroll deductions), you are performing substantial gainful work. Unless you submit information that establishes that you do not have the ability to engage in substantial gainful work, a determination will be made that you are no longer under a disability and your benefits will be terminated.

Please answer the questions on the next three pages. Sign your name at the bottom of the last page. In order to prevent possible overpayments of benefits to you return the form promptly. Please use the postage-free envelope enclosed. Unless this form is returned within the next 10 days your benefits may be suspended based on the information already in your file. If you need more time please let us know.

If you have any questions, or need help in filling out the form, please telephone or visit any social security office. The people there will be happy to help you. You can find the telephone number and address in the telephone directory listed under "Social Security Administration," or you can ask at your local post office. If you visit the social security office, please take this letter with you.

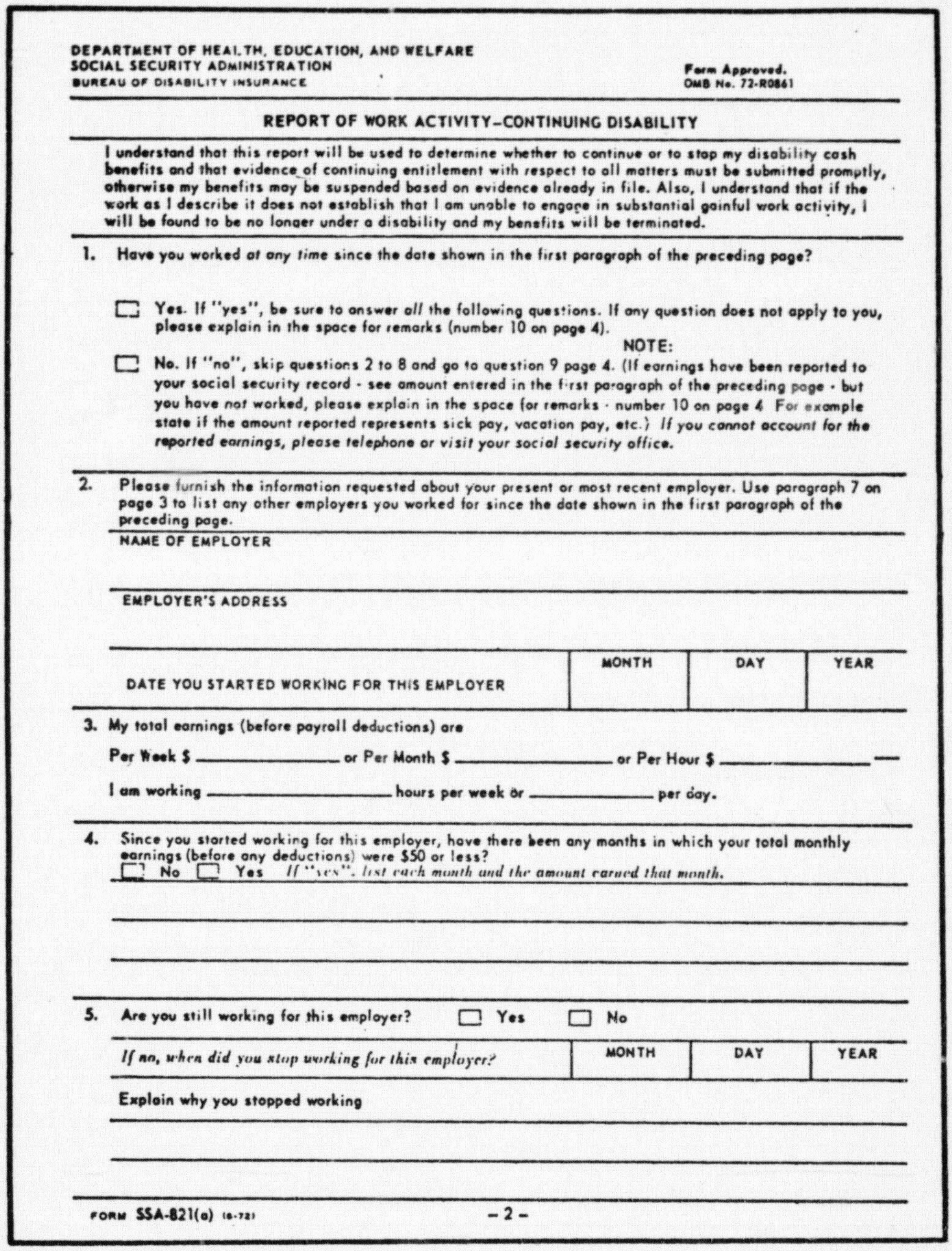
Sincerely yours,

CCHall

C. C. Hall
Assistant Director

Enclosure:
Pre-Addressed Envelope

SSA-L821(a) (6-72)



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF DISABILITY INSURANCE

Form Approved.
OMB No. 72-R0861

REPORT OF WORK ACTIVITY—CONTINUING DISABILITY

I understand that this report will be used to determine whether to continue or to stop my disability cash benefits and that evidence of continuing entitlement with respect to all matters must be submitted promptly, otherwise my benefits may be suspended based on evidence already in file. Also, I understand that if the work as I describe it does not establish that I am unable to engage in substantial gainful work activity, I will be found to be no longer under a disability and my benefits will be terminated.

1. Have you worked *at any time* since the date shown in the first paragraph of the preceding page?

☐ Yes. If "yes", be sure to answer *all* the following questions. If any question does not apply to you, please explain in the space for remarks (number 10 on page 4).

NOTE:

☐ No. If "no", skip questions 2 to 8 and go to question 9 page 4. (If earnings have been reported to your social security record - see amount entered in the first paragraph of the preceding page - but you have *not* worked, please explain in the space for remarks - number 10 on page 4. For example state if the amount reported represents sick pay, vacation pay, etc.) *If you cannot account for the reported earnings, please telephone or visit your social security office.*

2. Please furnish the information requested about your present or most recent employer. Use paragraph 7 on page 3 to list any other employers you worked for since the date shown in the first paragraph of the preceding page.

NAME OF EMPLOYER

EMPLOYER'S ADDRESS

	MONTH	DAY	YEAR
DATE YOU STARTED WORKING FOR THIS EMPLOYER			

3. My total earnings (before payroll deductions) are

Per Week $ ______________ or Per Month $ ______________ or Per Hour $ ______________

I am working ______________ hours per week or ______________ per day.

4. Since you started working for this employer, have there been any months in which your total monthly earnings (before any deductions) were $50 or less?

☐ No ☐ Yes *If "yes", list each month and the amount earned that month.*

5. Are you still working for this employer? ☐ Yes ☐ No

	MONTH	DAY	YEAR
If no, when did you stop working for this employer?			

Explain why you stopped working

FORM SSA-821(a) (6-72) — 2 —

6\.

A. What is your Job Title?

B. Briefly describe your duties

7. If you have worked for other employers since the date shown in the letter on top of this form please furnish the following information for each employer:

(a) Name of employer	(b) Address of employer
(c) Dates of employment	(d) Earnings per month before deductions

(e) Any months where you earned $50 or less

(Use paragraph 10 on page 4 if you need additional space for describing work for other employers.)

8. (a) Has your doctor told you to limit your activities in any way?

☐ No ☐ Yes ☐ Did not say

(b) *If "Yes", give the name of the doctor and what he told you about limiting your activities.*

(c) When did your doctor tell you this?

(d) Does your impairment affect your ability to do your work?

☐ No ☐ Yes *(If yes, explain how)*

9. Are you receiving services from or through the State vocational rehabilitation agency?

☐ No ☐ Yes *If "Yes," give*

Name and address of servicing rehabilitation office and counselor.

10. **Remarks:** Use the space below for explanation of question number one. Also, enter here any additional information that you believe is important and will assist in the review of your continuing entitlement to social security disability benefits. *(If you need more space, use a separate sheet of paper. Also, if you wish, you may attach any evidence that shows your current condition.)*

11. Do you authorize any physician, hospital, agency, or other organization to disclose to the Social Security Administration or to the State agency that may review your entitlement for continuing disability benefits, any medical records or other information about your disability? ☐ Yes ☐ No

I certify that the above statements are true, correct, and complete to the best of my knowledge. I know that anyone who fraudulently conceals or fails to report a disqualifying event or who makes a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act could be subject to a fine or imprisonment or both.

SIGN YOUR NAME AS YOU USUALLY WRITE IT ➡	DATE	PHONE NUMBER

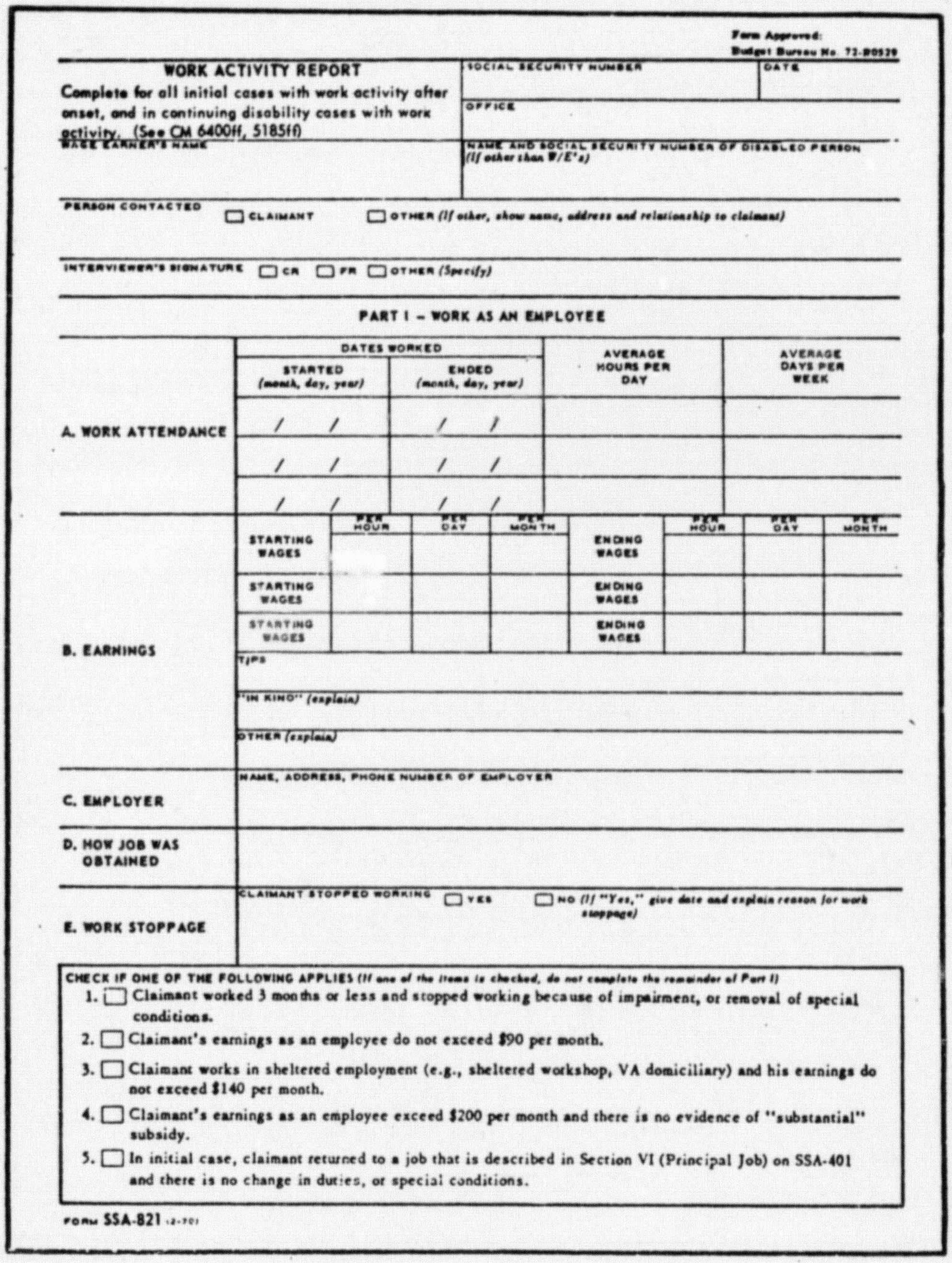
If the address shown on page one of this form is incorrect or incomplete, please enter your present address below

NUMBER AND STREET, APT. NO., P.O. BOX OR RURAL ROUTE

CITY	STATE	ZIP CODE

If we need more information after you send this form back to us, someone from the social security office or from the State agency that works with us in making disability decisions will get in touch with you.

6748. Form SSA–821 (Work Activity Report)



Form Approved:
Budget Bureau No. 72-R0529

WORK ACTIVITY REPORT

Complete for all initial cases with work activity after onset, and in continuing disability cases with work activity. (See CM 6400ff, 5185ff)

SOCIAL SECURITY NUMBER

DATE

OFFICE

WAGE EARNER'S NAME

NAME AND SOCIAL SECURITY NUMBER OF DISABLED PERSON *(If other than W/E's)*

PERSON CONTACTED ☐ CLAIMANT ☐ OTHER *(If other, show name, address and relationship to claimant)*

INTERVIEWER'S SIGNATURE ☐ CR ☐ FR ☐ OTHER *(Specify)*

PART I – WORK AS AN EMPLOYEE

	DATES WORKED		AVERAGE HOURS PER DAY	AVERAGE DAYS PER WEEK
	STARTED *(month, day, year)*	ENDED *(month, day, year)*		
A. WORK ATTENDANCE	/ /	/ /		
	/ /	/ /		
	/ /	/ /		

		PER HOUR	PER DAY	PER MONTH		PER HOUR	PER DAY	PER MONTH
B. EARNINGS	STARTING WAGES				ENDING WAGES			
	STARTING WAGES				ENDING WAGES			
	STARTING WAGES				ENDING WAGES			
	TIPS							
	"IN KIND" *(explain)*							
	OTHER *(explain)*							

C. EMPLOYER	NAME, ADDRESS, PHONE NUMBER OF EMPLOYER
D. HOW JOB WAS OBTAINED	
E. WORK STOPPAGE	CLAIMANT STOPPED WORKING ☐ YES ☐ NO *(If "Yes," give date and explain reason for work stoppage)*

CHECK IF ONE OF THE FOLLOWING APPLIES *(If one of the items is checked, do not complete the remainder of Part I)*

1. ☐ Claimant worked 3 months or less and stopped working because of impairment, or removal of special conditions.
2. ☐ Claimant's earnings as an employee do not exceed $90 per month.
3. ☐ Claimant works in sheltered employment (e.g., sheltered workshop, VA domiciliary) and his earnings do not exceed $140 per month.
4. ☐ Claimant's earnings as an employee exceed $200 per month and there is no evidence of "substantial" subsidy.
5. ☐ In initial case, claimant returned to a job that is described in Section VI (Principal Job) on SSA-401 and there is no change in duties, or special conditions.

FORM SSA-821 (2-70)

COMPLETE IF NO BLOCK (1 thru 5) ON PRECEEDING PAGE IS CHECKED

JOB TITLE

F. JOB DUTIES:
(List duties claimant performs in a typical day, giving percentage of day spent on each duty)

G. SUBSIDY:
(Check if any of these items apply. If any of the items are checked, develop subsidy with the employer per (CM 6421)

☐ Childhood disability case

☐ Mental impairment involved

☐ Sheltered employment

☐ An allegation is made that the claimant does not fully earn his pay

☐ The claimant's job duties differ from those of regular employees

☐ The claimant's hours of work differ from those of regular employees

☐ The amount of assistance received by the claimant differs from that of regular employees

☐ The claimant's work differs in quality or quantity from that of regular employees

☐ The claimant receives special considerations in the performance of his work

☐ Other indications of subsidy *(explain)*

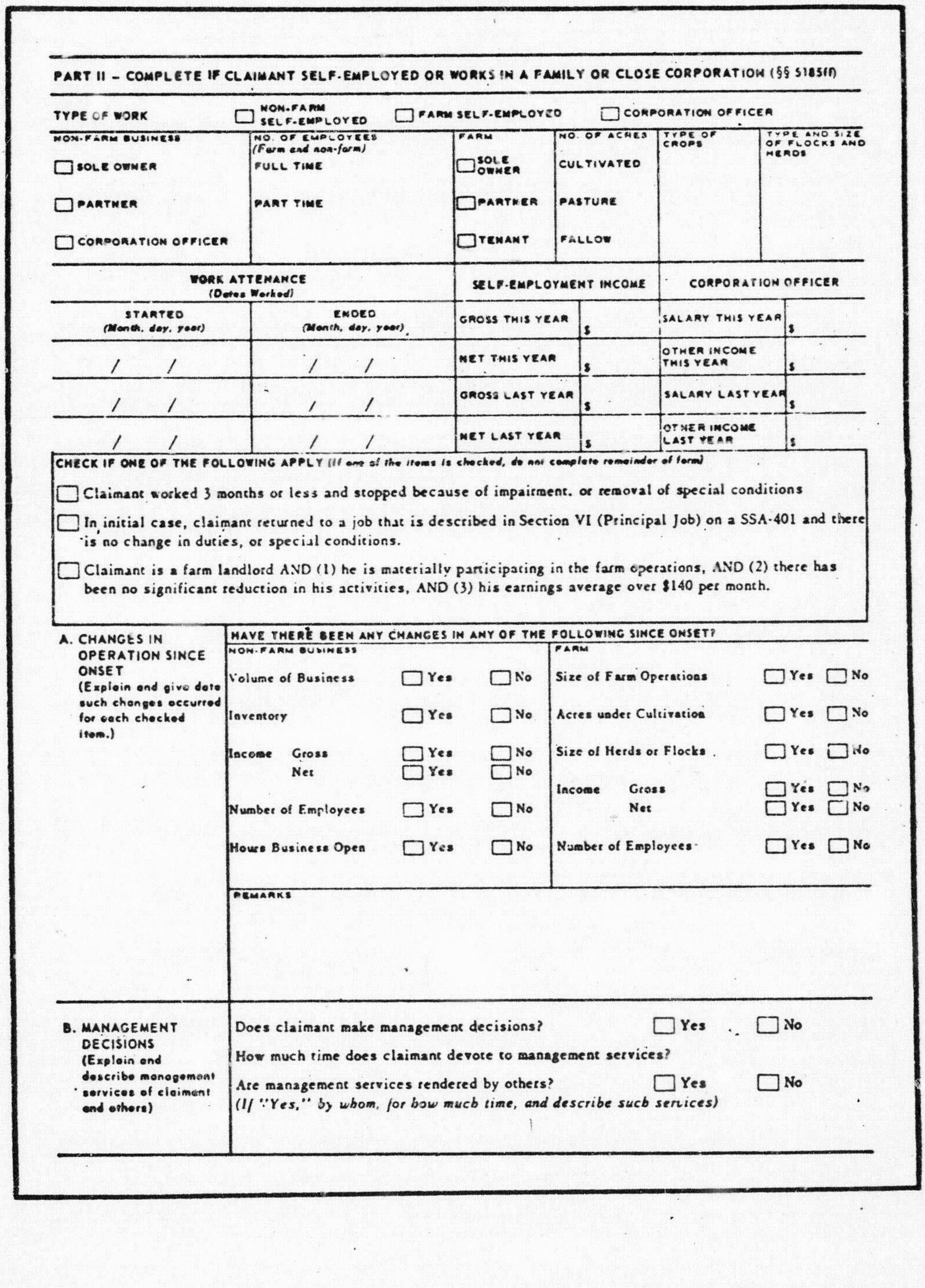
☐ None

H. COMPARABILITY
(CM 6422)

Do the claimant's earnings average between $90–$140 per month in non-sheltered employment after deducting any subsidy? ☐ Yes ☐ No

If "Yes," is the claimant's work comparable to that of unimpaired persons in the community engaged in similar occupations as their means of livelihood, or is the claimant's work reasonably worth over $140 a month according to pay scales in his community. Explain answer in sufficient detail.

REMARKS *(Record any unusual aspects of case)*



PART II – COMPLETE IF CLAIMANT SELF-EMPLOYED OR WORKS IN A FAMILY OR CLOSE CORPORATION (§§ 5185(f)

TYPE OF WORK ☐ NON-FARM SELF-EMPLOYED ☐ FARM SELF-EMPLOYED ☐ CORPORATION OFFICER

NON-FARM BUSINESS	NO. OF EMPLOYEES *(Farm and non-farm)*	FARM	NO. OF ACRES	TYPE OF CROPS	TYPE AND SIZE OF FLOCKS AND HERDS
☐ SOLE OWNER	FULL TIME	☐ SOLE OWNER	CULTIVATED		
☐ PARTNER	PART TIME	☐ PARTNER	PASTURE		
☐ CORPORATION OFFICER		☐ TENANT	FALLOW		

WORK ATTENDANCE *(Dates Worked)*		SELF-EMPLOYMENT INCOME		CORPORATION OFFICER	
STARTED *(Month, day, year)*	ENDED *(Month, day, year)*	GROSS THIS YEAR	$	SALARY THIS YEAR	$
/ /	/ /	NET THIS YEAR	$	OTHER INCOME THIS YEAR	$
/ /	/ /	GROSS LAST YEAR	$	SALARY LAST YEAR	$
/ /	/ /	NET LAST YEAR	$	OTHER INCOME LAST YEAR	$

CHECK IF ONE OF THE FOLLOWING APPLY *(If one of the items is checked, do not complete remainder of form)*

☐ Claimant worked 3 months or less and stopped because of impairment, or removal of special conditions

☐ In initial case, claimant returned to a job that is described in Section VI (Principal Job) on a SSA-401 and there is no change in duties, or special conditions.

☐ Claimant is a farm landlord AND (1) he is materially participating in the farm operations, AND (2) there has been no significant reduction in his activities, AND (3) his earnings average over $140 per month.

A. CHANGES IN OPERATION SINCE ONSET (Explain and give date such changes occurred for each checked item.)

HAVE THERE BEEN ANY CHANGES IN ANY OF THE FOLLOWING SINCE ONSET?

NON-FARM BUSINESS			FARM		
Volume of Business	☐ Yes	☐ No	Size of Farm Operations	☐ Yes	☐ No
Inventory	☐ Yes	☐ No	Acres under Cultivation	☐ Yes	☐ No
Income Gross	☐ Yes	☐ No	Size of Herds or Flocks	☐ Yes	☐ No
Net	☐ Yes	☐ No	Income Gross	☐ Yes	☐ No
Number of Employees	☐ Yes	☐ No	Net	☐ Yes	☐ No
Hours Business Open	☐ Yes	☐ No	Number of Employees	☐ Yes	☐ No

REMARKS

B. MANAGEMENT DECISIONS (Explain and describe management services of claimant and others)

Does claimant make management decisions? ☐ Yes ☐ No

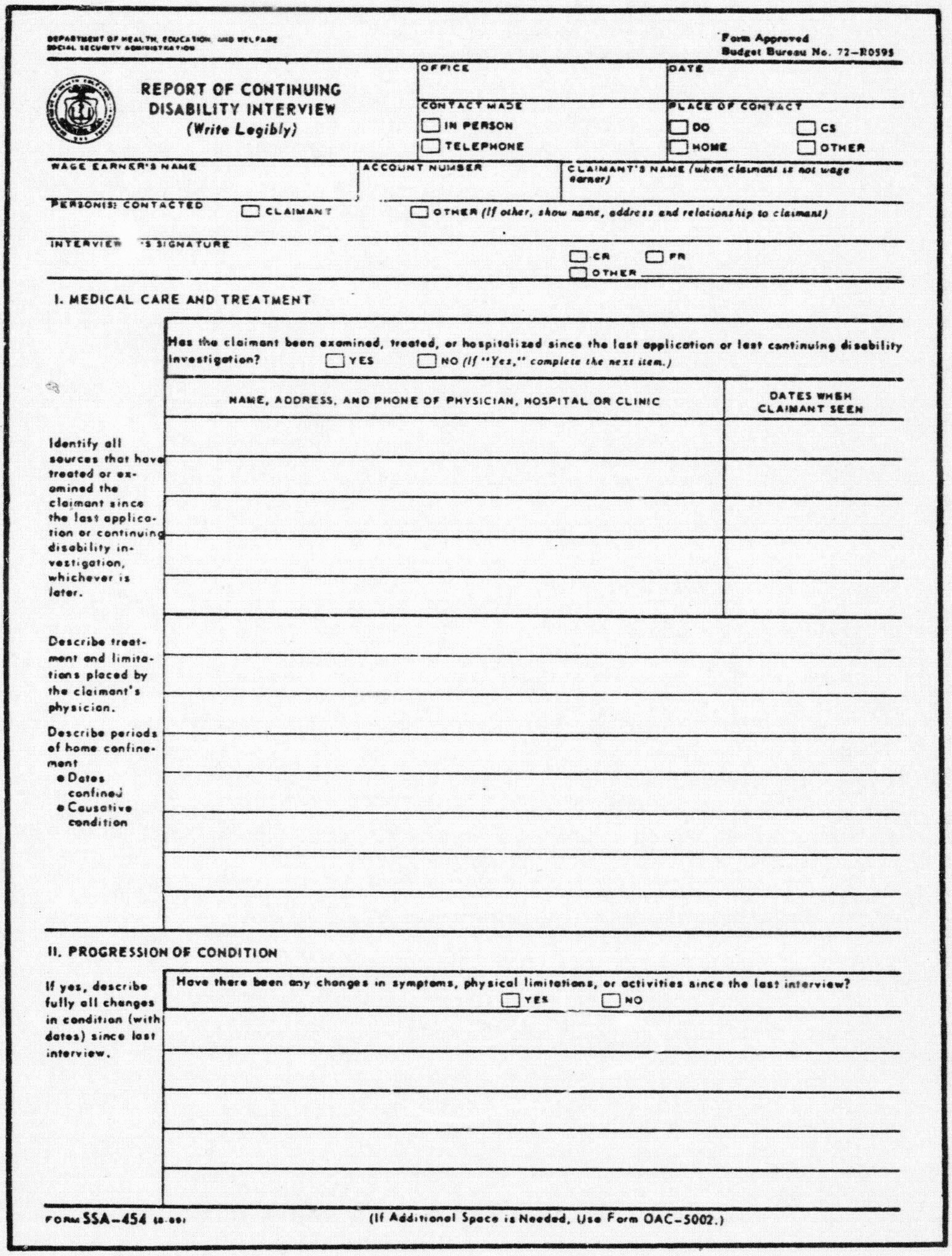
How much time does claimant devote to management services?

Are management services rendered by others? ☐ Yes ☐ No

(If "Yes," by whom, for how much time, and describe such services)

PART II (Continued)–Describe any other services rendered by claimant in operation of business and show time and percentage of time spent in each activity.	C. OTHER SERVICES
Explain any changes since onset and give date of occurrence.	
Explain nature of assistance ●	D. ASSISTANCE RECEIVED
Why was assistance given ●	
How many assistants ●	
How much time does assistant(s) devote to farm or business ●	
Describe duties of assistants ●	
Was payment made for this assistance If "Yes," how much and to whom ●	
Is there any relationship between claimant and assistants ●	
Estimate of value of unpaid assistance (use prevailing local wage rates) ●	
How does business compare with similar ones in the same area Size ● Type ● Hours of business or farm operation ●	E. OTHER FACTORS (Complete in all cases)
REMARKS *(Record any unusual aspects of case)*	

6749. Form SSA-454 (Report of Continuing Disability Interview)



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
Budget Bureau No. 72-R0595

REPORT OF CONTINUING DISABILITY INTERVIEW
(Write Legibly)

OFFICE	DATE
CONTACT MADE ☐ IN PERSON ☐ TELEPHONE	PLACE OF CONTACT ☐ DO ☐ CS ☐ HOME ☐ OTHER

WAGE EARNER'S NAME	ACCOUNT NUMBER	CLAIMANT'S NAME *(when claimant is not wage earner)*

PERSON(S) CONTACTED ☐ CLAIMANT ☐ OTHER *(If other, show name, address and relationship to claimant)*

INTERVIEWER'S SIGNATURE ☐ CR ☐ FR ☐ OTHER ____________

I. MEDICAL CARE AND TREATMENT

Has the claimant been examined, treated, or hospitalized since the last application or last continuing disability investigation? ☐ YES ☐ NO *(If "Yes," complete the next item.)*

	NAME, ADDRESS, AND PHONE OF PHYSICIAN, HOSPITAL OR CLINIC	DATES WHEN CLAIMANT SEEN
Identify all sources that have treated or examined the claimant since the last application or continuing disability investigation, whichever is later.		

Describe treatment and limitations placed by the claimant's physician.

Describe periods of home confinement
- Dates confined
- Causative condition

II. PROGRESSION OF CONDITION

If yes, describe fully all changes in condition (with dates) since last interview.

Have there been any changes in symptoms, physical limitations, or activities since the last interview? ☐ YES ☐ NO

FORM SSA-454 (8-69) (If Additional Space is Needed, Use Form OAC-5002.)

III. CURRENT CONDITION

Describe in the words of the claimant how his condition currently interferes with his ability to work.

IV. DAILY ACTIVITIES

Describe only the activities of a typical day that have changed since they were last reported.
- Physical
- Mental
- Contact with others

Describe assistance required in caring for personal needs.

V. EFFORTS TO WORK – Has the claimant performed any work since the established onset date that is not described in the file?

☐ YES ☐ NO *(If "Yes", complete an OA-D821 for each job)*

VI. VOCATIONAL REHABILITATION – Is the beneficiary being considered for or receiving services from or through the State Vocational Rehabilitation Agency?

☐ YES ☐ NO *(If "Yes," record (1) the name and address of the counselor and servicing office, (2) the type of services being received.)*

VII. OBSERVATIONS – Are the alleged impairment(s) observable?

☐ YES ☐ NO ☐ TELEPHONE CONTACT

			Hearing	☐ Yes	☐ No	Comprehending	☐ Yes	☐ No
			Use of hands			Breathing	☐ Yes	☐ No
Sight	☐ Yes	☐ No	and arms	☐ Yes	☐ No	Sitting	☐ Yes	☐ No
Reading	☐ Yes	☐ No	Writing	☐ Yes	☐ No	Walking	☐ Yes	☐ No
Responding	☐ Yes	☐ No	Speaking	☐ Yes	☐ No	Other	☐ Yes	☐ No

Check each item to the left to indicate whether or not any difficulty was observed.

Describe fully
- General appearance
- Behavior
- Outward attitude
- Circumstances surrounding the interview
- All "Yes" checked items above.

(If Additional Space is Needed, Use Form OAC-5002.)

T6260. DISTRICT OFFICE RESOLUTION OF WORK ISSUES

(a) DO Determines Work is SGA

District offices will resolve work issues where the question is solely whether or not the individual is or was engaging in substantial gainful activity (SGA). Where the work is determined to be SGA, prepare the SSA-831 (Disability Determination and Transmittal) in initial determinations of denial unless a visual impairment is alleged (§T6265(a)(4)) and in reconsideration of initial determinations. In continuing disability determinations (including reconsideration of cessation), complete the SSA-833 (Cessation or Continuance Disability Determination and Transmittal).

(b) DO Determines Work is Not SGA

If the DO determines that the work activity is not SGA, record this determination on an SSA-553 (Special Determination) and send the case to the SA or BDI in accordance with §T6265 and §T6266.

(c) Development Requests

If the DO has a request from the SA or BDI for development of a work issue but does not have the file, complete the development and forward it to the requestor. An SSA-831 or SSA-833 should not be completed without the folder; therefore, when the folder is not in the DO, prepare an SSA-553 and forward it with the development.

T6261. STATE AGENCY RESPONSIBILITIES

The SA will adjudicate medical-vocational issues in initial and reconsideration level cases and continuing disability investigations and make work-comparability decisions for the special definition of blindness for individuals age 55 and over. If in the course of its development of a case, the SA learns that the claimant or beneficiary is working, it will send the file to the DO for development and resolution of the work issue, unless there is sufficient information for a decision on other grounds (e.g., a medical-vocational denial, closed period of disability, or the claimant is entitled to a TWP). Generally, no medical or vocational development will be requested pending resolution of the work issue, and any evidence that had been requested earlier will be associated with the folder.

T6262. BDI RESPONSIBILITIES

(a) Claims Review

BDI will review those cases with a category checked in item 2 of the flag SSA-2822 (§T6276, Exhibit 2) and a sample of those cases which do not have a block checked in item 2. The DO copy of the approved SSA-831 or SSA-833 will be released, and the notification mailed to the claimant. If the DO decision is not approved, the file will either be sent to the DO for additional work development or to the SA for a medical-vocational determination. BDI will advise the DO why any DO SGA decision is not approved.

(b) Investigation of Work After Entitlement

BDI will screen and process all voluntary reports of work received by BDI (see §6705(a)), all the work activity alerts and job 455 printouts (see §§6705.2 and 6743), and maintain the TWP and medical diaries (see §6703ff).

BDI is responsible for initialing, controlling, and taking followup action for the direct mail development of work issues with disability beneficiaries. It will review the completed questionnaires, SSA-821(a) (Report of Work Activity - Continuing Disability) for completeness, and to determine if an unresolved question of continuing eligibility exists and initiate further development where indicated. Complex work issues and cases excluded from the direct mail procedures will be sent directly to the DO for investigation.

If BDI's review of the completed SSA-821(a) establishes that the evidence in file is sufficient to make a determination of continuance or cessation of disability, it will prepare the determination and notify the beneficiary. If BDI's review indicates that further development is needed, it will refer the case to the district office for processing.

T6263. DISTRICT OFFICE RESPONSIBILITIES IN CONTINUING DISABILITY INVESTIGATIONS

The DO is responsible for developing work activity in all continuing disability investigations referred by the SA or BDI, as well as in all cases in which the beneficiary reports to the DO that he has returned to work and the report raises a continuing disability issue. Where work activity is being investigated as a result of a SA or BDI referral (i.e., the DO has the case folder) it will be necessary for the DO to prepare or update the OAAD-299 (Trial Work Period Tally Sheet). (See § T6276, Exhibit 4.) This form should be placed inside the folder on the left under all other material. The DO reviewer should place an "X" in each month that the WE, child, or self-employed person, while entitled to benefits, performed "services" (i.e., work activity in employment in a month performed for remumeration or gain amounting to more than $50.00 either in cash or in kind. Services in self-employment should only be counted when net earnings in a calendar month are more than $50.00 or the self-employed persons spends more than 15 hours in that month in work activity). Upon completion of the entries, the DO reviewer will sign and date the form and indicate the last month and year for which he has made an entry. Where the beneficiary has completed his TWP (see §6703ff) the DO will secure an SSA-821 (Work Activity Report), and SSA-454 (Report of Continuing Disability Interview), and develop the work activity issue fully per §6705.2 and 6705.3.

In addition, the DO is responsible for assuring that the beneficiary understands that the investigation may result in his benefits being stopped and that he has an opportunity to submit any evidence that may have a bearing on the decision. When appropriate, the DO will explain why it appears that the work the beneficiary [illegible]s indicative of SGA. The DO will fully document the file with r[illegible] these actions, prepare a determination using an SSA-833 (Cessati[illegible]inuance Disability Determination and Transmittal), and assign t[illegible]opriate notification. The rationale will be given on SSA-834 (Continuation Sheet for Disability Determination). Cases with sensitive or complex issues are to be flagged (§T6272). In any determination of cessation, consider the beneficiary's right to due process (advance notice) before benefits are stopped (§§6705.3, 6706 and T6273).

T6264. SUBSEQUENT NOTICE OF WORK ACTIVITY AFTER NEW CLAIM LEAVES THE DISTRICT OFFICE

(a) Claim Sent to State Agency

When the DO receives notice of work activity after the case is sent to the SA, it should first notify the SA by telephone and then obtain enough information from the claimant to determine whether he engaged in SGA according to the criteria in §6403. If the claimant has resumed working and still wishes to pursue his claim, obtain a work activity report (SSA-821) per §6445. If the evidence confirms that the claimant engaged in SGA, the DO should request the folder from the SA by telephone in order to complete the SSA-831 and forward the claim to BDI. The SA will return the folder unless it can readily make a medical-vocational denial, or the DO can furnish the SA with sufficient information about the work to establish a closed period or TWP. If the conclusion is that the claimant did not engage in SGA, an SSA-553 (Special Determination) should be prepared and forwarded to the SA with the development.

(b) Claim forwarded to BDI

If the DO receives its copy of the SSA-831 showing that the SA allowed the claim and the file was sent to BDI, do not request the folder but notify BDI immediately by teletype that the claimant returned to work and forward to BDI development and a special determination (SSA-553) showing that the claimant did or did not engage in SGA.

T6265. CASES TO BE SENT TO STATE AGENCIES

The following cases will be sent to the SA unless they are otherwise excluded from SA jurisdiction (§§6252-6254, T6266). Prepare an SSA-553 concerning the SGA issue (§T6268).

(a) Initial Disability Claim (Complete Items 1 through 23 of the SSA-831 (Disability Determination and Transmittal) (§6272)).

(1) Work Activity Not SGA

The claimant is engaging in work activity at the time of filing but the DO concludes that the work activity is not SGA.

(2) SGA Ceased

The claimant was engaging in SGA after alleged onset but ceased SGA. The reason for discontinuance or reduction of work should be developed (§6452).

(3) Current Work is SGA But a Closed Period of Disability Is Possible

A closed period of disability may be found if the claimant did not engage in SGA due to an impairment during the 12-month period before he returned to work.

(4) Alleged Visual Impairment

A DIB or Freeze claimant of any age, or a CDB claimant age 55 or over is engaging in SGA but alleges a visual impairment, and disability was not previously established. If disability was previously established, see §6252.6.

(b) Initial Continuing Disability Cases (Complete items 1 through 6 of the SSA-833)

The claimant is not engaging in SGA, or the work is protected by the TWP and there is an issue of medical recovery, as indicated by:

(1) Medical Diaried Case (see item 33 - if blank see item 42 - of most recent SSA-831, or item 25 of SSA-833 on left side of folder)

(A) The beneficiary returned to work; or

(B) the diary has matured or will mature within 2 months.

(2) All Cases, Diaried or Non-Diaried

(A) The individual applies to become his own payee; or

(B) New Medical evidence or allegation indicates medical improvement.

Whenever an initial continuing disability case is sent to the SA for resolution of a medical issue, obtain an SSA-827b for the SA's use in current medical development. In addition, secure an SSA-821 and/or SSA-454 as needed (§6732) but do not prepare an SSA-831 or SSA-881A. Instead, prepare an RC showing the reason under (1) or (2) above that a medical issue exists and notify the beneficiary that his file is being sent to the SA for review.

(c) Reconsideration Cases

Route to the SA any initial denial in which the DO on reconsideration finds that the claimant is no longer engaging in SGA.

Route to the SA any SGA cessation in which the DO on reconsideration finds that the claimant is no longer engaging in SGA and there is a medical issue as evidenced by a medical reexamination diary date or other indications of possible medical recovery (§6732). Where required, update the medical and vocational evidence before forwarding the case (§6582).

Note: If the basis for the initial denial or the cessation was SGA and the reconsideration evidence now shows that the claimant or beneficiary was not engaging in SGA, carefully set forth on the SSA-553 the reasons why the prior determination is being reversed. These cases may be identified by "Reg-Basis Code" "N1-1532" or "N2-1532" (DIB or CDB case) or "N1-1504" or "N2-1504" (DWB case) on SSA-831, or by the rationale on the SSA-834.

(d) Reopenings

(1) Additional evidence shows that the prior SGA denial was improper.

(2) Additional evidence shows that a cessation based on SGA was improper and there is a matured medical reexamination diary or indication of medical improvement.

T6266. CASES TO BE SENT TO BDI

The following cases will be sent to BDI after the DO resolves all work issues, gives advance notice if required under §T6273, and prepares an SGA determination.

(a) Initial Disability Claims

The DO concludes that the claimant is engaging in SGA. (Closed period cannot be established §T6265(a)(3)--visual impairment not alleged §T6265(a)(4)). Complete the SSA-831 (§T6269).

(b) Initial Continuing Disability Cases

The SA or BDI has requested DO development of a work issue or a CDI is initiated per §6730(b) and the DO determines that the beneficiary:

(1) is engaging in SGA and the TWP has expired (or the beneficiary is not entitled to TWP - see §6703.2); or

(2) is not engaging in SGA and there is no medical issue (§T6265(b)). Complete the SSA-833 and SSA-834 (§T6271); or

(3) has a trial work period in progress.

(c) Reconsideration Cases

(1) Claimant engaging in SGA. Complete an SSA-831 (§T6270) or a SSA-833 (§T6271). If the DO is unable to obtain the folder, a determination should not be made on SSA-831. However, all SGA development should be completed and sent with the Reconsideration request and a Special Determination (SSA-553) to BDI, using Part 3, Block 1.B. of SSA-1415.

Note: If the initial denial or cessation was on the basis of SGA, the determination should be completed by a claims representative or other authorized person other than the one who completed the initial determination.

(2) If disability was ceased on the basis of SGA as shown by the rationale on the SSA-834, but the reconsideration evidence shows that the beneficiary was not engaging in SGA and there is no matured medical reexamination diary or indication of medical improvement, complete an SSA-833 (§T6271).

(d) Reopening

(1) Initial SA allowance-subsequent evidence shows claimant engaging in SGA.

Evidence shows that the claimant was engaging in SGA before expiration of the waiting period or prior to the date of award (§6736.9). If the DO has the folder it will determine if reopening and revising the prior determination is proper under the rules of administrative finality (§7000ff). Consider the beneficiary's right to due process (advance notice) before benefits are stopped based on the revised SSA-831, §T6270, T6723.

(2) Additional evidence shows that a cessation based on SGA was improper and there is no matured medical diary or admission of medical recovery. Prepare a determination of continuance on SSA-833 and SSA-834 (§T6271).

T6267. CONSIDERATIONS IN RESOLVING WORK ISSUES

An SGA denial or cessation must be based on evidence establishing that the work activity demonstrates a continuing ability to engage in SGA, considering the hours, earnings, and duration of the work. Total monthly earnings at an SGA level generally are indicative of an ability to engage in SGA. However, if it appears that the sustained work requirements are incompatible with the individual's physical or mental limitations due to his impairment, the DO should be alert to the possibility of an unsuccessful work attempt. Case experience has shown that where an employer provides "made" work or special conditions, or a self-employed person receives unpaid assistance from family members or others, the value of the individual's services may be substantially less than the remuneration. In those circumstances, and the situations listed below, information about the job duties, hours, responsibilities, and other factors relating to the value of the services is necessary to resolve the work issue:

(a) Childhood disability;

(b) Mental impairment;

(c) Employment in a therapeutic program;

(d) Allegation that work is "made" work or that all or a portion of pay is a subsidy;

(e) Self-employment on a family farm or in a family business;

(f) Employment in a sheltered workshop or other institutional program;

(g) Alleged unpaid assistance from family members or others;

(h) Self-employment in which it is alleged that significant services were not rendered; and

(i) Any other situation in which the work requirements are apparently incompatible with the individual's physical or mental limitations.

The guides in §6400ff will apply in developing and resolving work issues.

T6268. PREPARATION OF THE SSA-553 (SPECIAL DETERMINATION)

When a case is transmitted to the SA in accordance with §T6265 or to BDI in accordance with §T6264(b) or §T6266(c)(1) prepare an SSA-553 as needed. Set out your findings and conclusion that the work activity being performed by the claimant does not constitute SGA. If the earnings exceed $140 a month, the determination should show to what extent the work is subsidized, the claimant receives unpaid assistance. or he incurs impairment related expenses. Cite appropriateclaims manual references from § 6400 ff. to support the determination.

T6269. COMPLETION OF THE SSA-831--DENIAL OF INITIAL TITLE II DISABILITY CLAIM (FOR TITLE XVI CASES, SEE §A6278).

When the conditions in §T6266(a) are met, the DO will fully prepare the SSA-831. Complete Items 1 through 23 in accordance with §6272 and the additional items indicated below:

Item 26 - Check this block when the insured status (DIB case) or prescribed period (DWB case) requirement is last met prior to the date of the current determination. Enter the date the insured status or prescribed period requirement is last met.

Check this block in a CDB case (where there was no prior CDB entitlement) if the claimant engaged in SGA before he attained age 22. Enter the date the claimant attained age 22. In a CDB reentitlement claim, check this block when the reentitlement period has expired. Enter the last day of the reentitlement period.

Item 27 - Check this block when the insured status (DIB case) or prescribed period (DWB case) requirement continues to be met through the date of the current determination.

Check this block in a CDB case (where there was no prior CDB entitlement) if the claimant began engaging in SGA after he attained age 22. In a CDB reentitlement claim, check this block if the claimant began engaging in SGA after the end of the reentitlement period.

Item 29 - Enter "None established."

Item 30 - Enter the code letter shown before the checked block from item 6 of the SSA-16 or item 7 of the SSA-17, e.g., a,b,c, etc.

Item 31 - Refer to Item V or VI of the SSA-401 and show in the "Vocational Background (Occupation)" block the claimant's customary occupation or, if not determined, the longest full-time occupation in the 15-year period immediately preceding the alleged date of onset of disability. The entry should indicate both the industry and the specific job title involved, e.g., coal mining, coal cutting machine operator.

Show in the "Occupational Years" block the number of years that the claimant worked in his customary occupation, if determined, or if not determined, in his longest full-time occupation. When there are broken periods of employment in that occupation, determine the total number of years he was employed or available for employment in the shown occupation.

In the "Educational Years" block, enter the highest grade of school completed by the individual, including any part-time and night courses. Use "12th grade" to indicate completion of high school, "13th grade" for one year of college, etc. Also, enter the type of school and number of years completed in specialized schools, such as nursing school, accounting school or ungraded vocational school.

Item 22 (Diagnosis) - Enter the diagnosis shown in Item 29 on most recent SSA-831 or item 22 on SSA-833 in file; with multiple impairments enter the first impairment listed.

Item 23 (MOB Code) - See ST6269 Item 30 for the appropriate code.

Item 24 Remarks - See ST6269 Item 41 for possible entry to explain special situation.

Item 25 Diary Date - Check TWP block if beneficiary is entitled to and has not completed a TWP and is continuing to work; check block TWP, enter the anticipated eighth month of work. Check "None", when appropriate.

Item 26 - Cross out Disability Examiner, write C/R and sign in this bloc

Item 27 - Enter current date.

Item 28, 29, and 30 - Leave blank.

Item 31 - For continuance of disability enter the appropriate continuanc letter number. (See Exhibits 5 through 9.) For cessation of disability enter appropriate paragraph(s) number (See Exhibit 10).

Letter 10 (Exhibit 8) contains a choice of two inserts. When the file is to be forwarded to BDI in a CDB Continuance after the TWP has expired, the DO will indicate in Item 31 of Form SSA-833 - "10" followed by insert number "1" or "2" (i.e., "10-1" or "10-2"). When the file is to be forwarded to a Program Center indicate in Item 31 "Exhibit 106(a)" - (i.e., "Ex. 106(a)-1"; or "Ex. 106(a)-2"). Use insert "1" when block 21B of Form SSA-833 is checked (TWP completed/Work continuing). Leave Item 31 blank if DWB or DWB-DIB. In reconsideration cases enter Exhibit 12 for DIB or CDB cessation.

Letter 11 - CDB Continuance (TWP Not Expired)

Indicate in Item 31 of SSA-833 "11" in RSI and BDI Cases followed by the date of expected 9th month of TWP, i.e., "11-4/74".

Items 32-33 - Leave blank.

Item 34 Category - Check the appropriate block.

(b) SSA-834 (Continuation Sheet) If used, check Item 12 of SSA-833

Summarize the evidence supporting the DO's conclusion that the claimant was or was not engaged in SGA or has returned to SGA. The rationale for continuance, for example, should show that the beneficiary did not complete his TWP or that it was determined that his work activity after the TWP did not represent SGA.

The DO reviewer should sign and date the SSA-834.

The rationale for cessations should show:

(1) that the due process requirements are met (see §T6273).

(2) that he was or was not entitled to a TWP, that his work activity was determined to be SGA and that his month of cessation was determined to be (month/year).

T6272. FLAGGING CASES INVOLVING SGA WORK ISSUES

When a work issue case is sent to BDI in accordance with §T6266, prepare the flag SSA-2822 (DO Work-Issue-Only-Case Flag - See §T6276 , Exhibit 2). Identify the appropriate category of case in Item 1 and check any applicable block in Item 2. Staple the form securely to the outside of the folder jacket. (See §6276ff and §6280ff for preparation of the folder and assembly of claims material.)

T6273. DUE PROCESS IN WORK ISSUE CASES

(a) General

Advance notice is required before benefits are stopped unless the action is based solely on work information reported by the beneficiary (or his payee), it is clear that he knew the effect of such information when he gave it, and there is no substantive conflict in the evidence. For example, when the folder is documented that the beneficiary has been informed of the purpose of the CDI (e.g., a completed SSA-821(a) is in file) and he reported the information supporting a cessation and no conflict exists (see "b" below), the beneficiary has been afforded "due process" without need for further notice to the beneficiary unless he states that he believes that his benefits should be continued. Any information or evidence received as a result of this contact must be considered before the DO completes its determination.

(b) Material Conflicts in Work Activity Cases

When a material conflict arises from the beneficiary's answers on the report of his work activity or from other evidence, the DO will resolve the conflict with the beneficiary. Where it appears that a determination of cessation will result and the evidence supporting the cessation was not provided by the beneficiary, or it is not obvious that the beneficiary expects his benefits to stop, notify the beneficiary of the proposed stoppage of his benefits, the reasons for the stoppage, and afford him an opportunity to submit rebuttal evidence. A material conflict exists if a discrepancy in the amount of earnings or period of work raises a question about the correct month of cessation, e.g., the beneficiary alleges he did not work or that he did not earn the amount of wages reported. A material conflict may also exist when the beneficiary states that his impairment affects his ability to perform his work, his work is subsidized, or he indicates that he does not believe that his benefits should be ceased. When additional development is needed to resolve any issue, this should be done without delay. If there is any doubt concerning the beneficiary's understanding regarding his right to continue to receive benefits, resolve the doubt by furnishing the beneficiary with a predetermination notice to afford him advance notice of benefit stoppage and the opportunity to present rebuttal evidence.

(c) Predetermination Notification

Predetermination notices must contain the following key elements and the folder should be documented accordingly:

Note: Auxiliary beneficiaries not living in the same household must be furnished with a copy of the notice sent the primary beneficiary.

(1) Inform the beneficiary that based on the evidence now in file it appears that a determination would have to be made that he has regained ability to engage in SGA in (month/year.)

(2) Summarize the pertinent evidence and explain why it appears that he has regained the ability to engage in SGA as well as:

(A) the basic facts regarding the nature of the work being done (e.g., job title);

(B) the name of the employer(s);

(C) the number of months employed;

(D) the dates of employment; and

(E) the current or most recent salary.

(3) Explain that we are notifying him at this time to give him an opportunity to present any additional evidence that he wants us to consider.

(4) Tell him that unless we hear from him within 10 days the Social Security Administration will make a formal determination based on the evidence in file. Point out that it is important, therefore, that he submit a statement or evidence within 10 days or let us know if he needs more time.

(5) Explain that when a formal determination is made he will be notified in writing what the determination is. Also inform him that if it is determined he has regained the ability to engage in SGA and therefore that his disability has ceased, he will be eligible to receive benefits for the month in which disability ceased and for each of the two months following that month.

(d) Suggested Language for Predetermination Notice

"Earlier, you were notified that your claim was being reviewed to decide whether you are again able to do substantial gainful work. This is to notify you that based on evidence now in file it appears you regained ability to engage in substantial gainful activity in (month/year)."

Use the following two paragraphs only where the beneficiary was entitled to a trial work period and has completed the trial work period §6703ff. "The Social Security Law provides a trial work period so that you can test you ability to work, despite your impairment, without losing benefits. The trial work period may last for as long as 9 different months in which you have done some work. These 9 trial work months may be consecutive or they may be separated by months in which you do no work at all. Any month in which you worked and earned over $50 in employment or worked more than 15 hours in self-employment since you became entitled to benefits counts as one of the 9 work months.

"Our decision is based on the actual work you did during this 9 month period and how much you have been paid for doing the work. (Earnings of more than $140 a month for instance, usually indicate that a person has regained his ability to do substantial gainful work.)

"The evidence shows that you returned to work in (month/year) for the (employer's name). You worked as (job title). You were paid $ an hour working an average of hours per week. At the present time, you continue to work doing (provide a brief description of duties) and you earn an average of $ a month. Based on the evidence in file, it appears that a determination will be made that you regained ability to engage in substantial gainful activity in (month/year). The law provides that an individual will receive his benefit payments for the month his disability ends and the following 2 months. Therefore, the last disability check to which you would be entitled would be for the month of (month/year).

"We are writing at this time to give you the opportunity to present any additional statement or evidence you want to be considered before a determination is made. If you want to submit such a statement or evidence, please send it to us within the next 10 days using the enclosed envelope which requires no postage.

"If you do not contact us within 10 days we will make a formal determination as to your continuing entitlement to benefits based on the evidence in file. It is important, therefore, that you let us know within 10 days if you want to submit a statement or evidence. If additional time is needed for submission of this material, consideration will be given to your request for more time".

(e) Following up on Predetermination Notices

Contacts with the beneficiaries, including auxiliaries, whether in person, by telephone, or by mail should be documented. The DO will set up appropriate diary controls, complete its determination, and send the folder to BDI at the appropriate time. The DO is not expected to follow up with a beneficiary who fails to respond to the letter; if there is no response in 15 days, the DO will complete its action. Where the beneficiary does respond to the letter but requests more time to get additional evidence, the DO should follow up 20 days thereafter if the evidence is not forthcoming. The DO should be in a position to complete its determination no later than the 40th day after the predetermination notice was sent to the beneficiary.

(f) Acknowledging Receipt of Additional Information

Where additional information is received that does not alter the proposed finding of cessation, the DO will prepare a brief acknowledgement. This acknowledgement is required even though the beneficiary's response is not considered substantive. If, as a result of the beneficiary's response the cessation date is changed to a date earlier than the date mentioned in the original predetermination notice, a second predetermination notice is necessary.

The following language should be contained in the notice. "This acknowledges receipt of the additional information you sent to us. It will be considered along with the other evidence in your case in arriving at a determination as to your continuing entitlement to disability insurance benefits. When the formal decision is made, you will be notified."

Note: Do not include any statement as to the significance of the information received.

T6274. SUSPENSION OF BENEFITS BECAUSE OF WORK ACTIVITY

Request for the suspension of disability benefits in work issue cases should only be made when the evidence convincingly establishes a basis for cessation of benefits, an overpayment exists or is imminent, and the DO expects the completion of the CDI to be delayed over 40 days (§6706). Suspension of disability benefits (including auxiliary payments, if any) is to be processed only after advance notice (in person, by phone, or by mail) under "due process" procedures (see §6707). The DO will notify the beneficiary and all auxiliary beneficiaries not living in the same household of any proposed action to suspend benefits (in accordance with §6706) before transmitting a suspension request to BDI. The DO should not suspend if cessation is effective for the current month since the beneficiary is entitled to two additional months of benefits after the month of cessation. The DO will not use the suspension procedure when possible reentitlement after a work cessation exists. The DO should develop and document all aspects of possible reentitlement and send to the SA.

T6275. BDI FEEDBACK TO DO'S ON DEFICIENCIES AND REVISED DETERMINATIONS

Where BDI's review of the case reveals technical deficiencies only, the incorrectly completed items on the SSA-831 will be circled, missing information will be entered, the involved items will be identified in item 41, and the DO copy will be returned for informational purposes.

Where BDI's review reveals a substantive deficiency in the SGA determination, BDI will either revise the determination, return the case to the DO for additional information, or send the case to the SA for a medical vocational determination. In any of these situations, the DO will be notified by BDI on an SSA-DL880, or by a photocopy of SSA-847 (BDI Request for Case Action) which is used to transmit the case to the SA.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

Social Security Administration

March 22, 1974

SSA DISABILITY INSURANCE LETTER NO. II-46

(To be filed at the end of Part II of the Disability Insurance State Manual)

SUBJECT: Jurisdiction of Work Issue Only Cases

I. General

The State agreements have been modified to exclude from SA jurisdiction any case in which the issue to be resolved is solely whether or not the individual is or was engaging in substantial gainful activity. Social security offices will make determinations of denial, cessation, or continuance, as appropriate, in such cases, subject to BDI review. If a case cannot be decided solely on the basis of whether the claimant engaged in SGA in initial, continuing, or reconsideration cases, the SA will resolve the medical and vocational issues unless the case is otherwise excluded from SA jurisdiction. Thus, some claims in which the district offices have determined that work activity is SGA will be sent to the SA for a determination, for example, the claimant alleges blindness or a closed period of disability can be established. All work issue cases sent to the SA will contain a special determination (Form SSA-553) resolving the SGA question. This rationale should be incorporated into the SA determination.

The following instructions apply only to Title II cases. Instructions for handling work issue Title XVI new claims are included in DIL II-42 (Revised).

II. Work Issue Cases to be Sent to State Agencies

A. Initial Disability Claims

1. Work Activity Not SGA

The claimant is engaging in work activity at the time of filing but the DO concludes that the work activity is not SGA.

2. SGA Ceased

The special determination prepared by the DO shows that the claimant engaged in SGA after the alleged onset date but subsequently ceased SGA. The SA may find an onset date subsequent to the period of SGA, or may find that the claimant is not disabled.

3. Claimant Currently Engaging in SGA but a Closed Period of Disability is Possible

Where the claimant is currently engaging in SGA but previously did not engage in SGA for a period of at least 12 months due to an impairment, the SA will determine whether he is entitled to a closed period of disability. If a closed period can be established, the period will end as of the date the claimant returned to SGA as shown in the DO special determination.

4. Alleged Visual Impairment

If a DIB or freeze claimant, or a CDB claimant age 55 or over, is engaging in SGA but alleges a visual impairment and disability was not previously established, the DO will forward the case to the SA for a disability determination. If disability is established on the basis of statutory blindness, the SA determination should show that the claimant is not under a disability for cash benefit purposes.

If it is determined that the claimant is statutorily blind, and is over age 55, and the DO has determined that he is engaging in SGA, the SA will resolve the issue of whether his work is comparable to the SGA he performed before the date he was both age 55 or older and blind (DIL III-7).

B. Continuing Disability Cases

The beneficiary is not engaging in SGA and either (1) the CDI development indicates possible medical recovery (e.g., new material evidence or a statement of medical recovery) or (2) the medical diary has matured or will mature within 2 months; the DO will forward the case to the SA.

C. Reconsideration Cases

Reconsideration cases in which there is a need for a medical-vocational determination after DO resolution of the work issue will be sent to the SA. If the basis for the initial denial or cessation was SGA, and the reconsideration evidence now shows that the claimant or beneficiary was not engaging in SGA, the special determination prepared by the DO will include an explanation of why the initial determination is being reversed.

III. Work Issue Arises While Case is in SA

If the SA learns that the claimant or beneficiary is working, development should be discontinued and the file returned to the DO for development and resolution of the work issue, unless the SA has enough information to make a decision on other grounds (e.g., a medical-vocational denial, closed period of disability, or the claimant is entitled to a trial work period). When returning a case to the DO, annotate the folder to show the status of the medical-vocational development in the event that the file is subsequently returned to the SA. Evidence received in the SA subsequent to return of the folder to the DO should be forwarded to the DO for association. If the SA makes a decision on other grounds the completed case should be sent to BDI in accordance with the regular routing procedures.

If the DO is notified of work activity after the file has been sent to the SA, the DO will develop the information necessary for an SGA determination. If it finds that the work activity is cause for denial, it will request the SA to return the folder so that a determination can be made and the claim forwarded to BDI. If the DO determines that the claimant's work is not a basis for denial, or if the SA is making a decision on other grounds (i.e., a medical-vocational denial, closed period of disability, or the claimant is entitled to a trial work period), the developed material and a special determination on the work issue will be forwarded to the SA. Where the DO has received its copy of the SSA-831 from the SA showing that the file was sent to BDI, the DO will notify BDI immediately by teletype that the claimant returned to work and forward to BDI the development and a special determination showing that the claimant did or did not engage in SGA.

IV. Pipeline Cases

Cases that are pending in the SA at the time that these procedures are implemented should be adjudicated if the SA has all the information necessary to make an SGA determination. Cases that are pending in the SA because there is insufficient information to resolve the work issue should be returned to the DO, unless the SA is able to make a decision on other grounds (i.e., a medical-vocational denial, closed period of disability, or the claimant is entitled to a trial work period). For SGA determinations made in the SA subsequent to the change in jurisdiction, the SA should flag the case by stapling a Form OAAD-408 (Route Slip) addressed to BDI to the outside of the folder, with the words "SGA Pipeline Case" in the remarks section of the form.

V. Request for Guidance

Please refer any questions or problems which may arise pursuant to these instructions to the Regional Representative, DI.

Bernard Popick, Director
Bureau of Disability Insurance

Action Note:

DIL III-11, § III.E. (page 10) - Delete the parenthetical statement at the end of the first paragraph and cross-refer this section to DIL II-42 (Revised 1/31/74).

APPENDIX C

ESTIMATED COST OF PROVIDING ORAL EVIDENTIARY HEARINGS PRIOR TO TERMINATION OF SOCIAL SECURITY DISABILITY BENEFITS

1. NUMBER OF HEARINGS

The Social Security Administration projects that in the fiscal year 1976 there will be approximately 44,000 initial determinations that disability has ceased. On the basis of past experience (see App. A, *supra,* p. 10A), at least 25 percent (*i.e.,* 11,000) would dispute, and request reconsideration of, that determination under present procedures. If a pre-termination oral hearing were substituted for the present reconsideration procedure (see *id,* at 10A–11A), it seems reasonable to take 11,000 as a base figure for requests for pre-termination evidentiary hearings (cf. p. 51, *supra,* n. 62).

2. LENGTH OF THE PERIOD OF EXTENDED OVERPAYMENTS

The initial element is the period of pre-hearing notice given. While *Goldberg* v. *Kelly,* 397 U.S. 254, indicated that a seven-day notice would ordinarily be constitutionally sufficient for welfare termination hearings (397 U.S. at 268), the nature of the issues, and the possible need to obtain medical witnesses, or to travel to a distant city for a hearing, suggest the advisability of providing somewhat greater notice than that, such as 30 days,[1] even if a shorter period might be constitutionally sufficient. Whatever the period, benefits would presumably have to be paid to all beneficiaries for the month during which it is determined whether a hearing is being sought.

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[1] Under the SSI program, Congress has provided that a person disagreeing with an eligibility determination may request a hearing within 30 days. 42 U.S.C. (Supp. III) 1383(c)(1).

Even assuming that the body conducting the hearings (whether the state agency, the SSA district office, or the Bureau of Hearings and Appeals) could immediately absorb and continue to keep current with the new caseload of hearings, it is unrealistic to assume that hearings will typically be held and cases decided immediately after the minimal notice period. Even without regard to existing caseloads, backlogs and staff shortages, it seems prudent to expect that requests for pre-termination hearings would result in decisions, on the average, no sooner than two months later.[2] To the extent that the realities of the present situations of the agencies involved are considered, this period must inevitably be longer.

3. COST OF BENEFIT OVERPAYMENTS

If benefits are paid to workers subsequent to the initial determination that they are no longer disabled, and that determination is not challenged or is upheld in further proceedings, the net cost of the resulting overpayment of benefits will depend on several factors.

SSA estimates that, under current procedures, initial determinations are made one month after the month of cessation of disability in about half the cases and two or more months after cessation in the remainder. Accordingly, in half the cases the two-month grace period (see p. 16, *supra*) has already expired and benefits are terminated immediately, while in the other half benefits are terminated one month after the initial determination. Accordingly, in half the cases any extension of the payment of benefits will be beyond the grace period, while in the other half any extension beyond one-month will do. Thus, as to half of the 33,000 who would not seek a hearing, there would have been a one-month overpayment for the period given within which to do so.

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[2] Under the SSI program, Congress has provided that, after a hearing, determinations shall be made within 90 days of the request for a hearing, "except to the extent that the matter in disagreement involves the existence of a disability * * *." 42 U.S.C. (Supp. III) 1383(c)(2).

As to those who do seek a hearing, one must estimate the proportion of cases in which the ultimate decision sustains the initial determination that the worker is no longer disabled. Under present procedures, initial determinations concerning initial claims are sustained in about 60 to 70 percent of the reconsiderations (see p. 31, *supra*), and about 50 to 60 percent of the far smaller number of cases in which post-termination hearings are requested (see p. 31, *supra*). If we assume an "affirmance" rate of 60 percent, then in 30 percent of the cases where pretermination hearings are sought there would be overpayments for every month following the initial determination, and in 30 percent there would be overpayments beginning with the second month after the initial determination.

The ultimate cost of all such overpayments depends upon the prospects for recoupment. Since most terminated beneficiaries will presumably not be receiving other payments that the Secretary could withhold, the only alternative would be legal action against those who cannot or will not voluntarily return the overpayments. Even if beneficiaries are fully forewarned that benefits received subsequent to the initial determination may be subject to repayment if that determination is sustained or if a hearing is not sought, the rate of such recoveries, where warranted, would be low. Moreover, in many cases the Secretary will not be entitled to seek recoupment under the Act and regulations (see pp. 32–33, *supra*). Based on past experience, SSA believes that a recoupment rate exceeding 33 percent would be unrealistic.

Application of these figures to the current average monthly benefit of $335 produces a total cost of approximately $10,000,000 for the first month following the initial determination and $1,500,000 for each month of delay thereafter. Under present procedures at least ten months now elapse from the request for a hearing to the decision after hearing (see pp. 50–51, *supra*), and if comparable delays were to occur with pre-termination hearings the cost in overpayments alone could amount to $23,500,000 annually.

4. ADDITIONAL ADMINISTRATIVE COSTS

The actual administrative cost involved in providing the necessary hearings is a function of the cost per ing to SSA, the average cost of an administrative law judge hearing is currently $536. Thus, the 11,000 projected hearings would cost about an additional $6 million annually. Although a state agency hearing structure might entail lower costs per hearing (estimates vary between $150 and $200 per hearing) there would be the added costs, both in dollars and in hours, of training personnel and implementing a totally new system.

Against these costs must be offset the cost of some unpredictable portion of the post-termination hearings (currently 1,900) as well as the 11,000 reconsiderations[3] that would not be required (see p. 63A, *supra*). Even if, contrary to the premise of *Goldberg* v. *Kelly*, (see p. 52, *supra*, n. 63), all post-termination hearings were eliminated or rendered unnecessary, the additional administrative costs would still be substantial, ranging from about $1.3 million to $4 million annually.[4]

In addition, a requirement of live medical testimony at such hearings would substantially increase the costs. *Richardson* v. *Perales*, 402 U.S. 389, 406; cf. *Staff Report* 229.

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[3] No precise data on the cost per reconsideration is available, but the average unit cost of all state agency determinations (ex[illegible]ng the cost of consultative medical examinations) was $50 in 1973 (*Staff Report* 150), and we use that as a rough estimate.

[4] Depending whether the hearing cost averages $200 or $500.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-204

CASPAR W. WEINBERGER,
Secretary of Health, Education & Welfare,
Petitioner,

v.

GEORGE ELDRIDGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Miscellaneous:

Meyerhoff and Mishkin, *Applications of Goldberg vs. Kelly Hearing Requirements to Termination of Social Security Benefits,* 26 Stanford Law Review 549 (1974) 10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-204

CASPAR W. WEINBERGER,
Secretary of Health, Education & Welfare,
Petitioner,

v.

GEORGE ELDRIDGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The respondent states that the Secretary of Health, Education and Welfare has accurately stated the opinions and references thereto in his brief.

JURISDICTION

The Secretary of Health, Education and Welfare has accurately stated the jurisdiction of this Court in his brief.

QUESTION PRESENTED

Was George Eldridge denied due process of law under the Constitution of the United States when his Social Security Disability Benefits, which had twice been awarded him following a full evidentiary hearing, were terminated by the Secretary of Health, Education and Welfare without the opportunity being afforded him of an evidentiary hearing, of equal purport, as the hearing in which he was found to be entitled to such benefits?

STATEMENT

The respondent does not disagree with the statement made in the Secretary's brief, however points out that George Eldridge was initially awarded disability benefits by a hearing examiner (now Administrative Law Judge) on June 8, 1968. These benefits were terminated without affording George Eldridge *any* opportunity of offering evidence of continued disability on February 18, 1970. On June 26, 1970, the United States District Court for the Western District of Virginia ordered benefits to continue until a final determination was made. On May 6, 1971, approximately sixteen (16) months following the decision to terminate benefits, a hearing examiner for the Social Security Administration determined George Eldridge's disability had not ceased.

On June 12, 1972, George Eldridge was advised that it had been determined that he was *again* no longer disabled as of May, 1972. He was not advised of what medical reports or what doctors had made this determination. In fact, assuming that George Eldridge could and did read and understand the contents of the termination letter (which may or may not be a false assumption), he was not told that the cumulative effect of his impairments were not disabling (as is required by Social Security regulations to be done by a physician designated by the Secretary of Health, Education, and Welfare).

George Eldridge, then, was advised that it had again been determined (for a third time) that he was no longer disabled and that his disability benefits would cease in July, 1972. This was done irrespective of the two prior hearing determinations that he was indeed disabled, and irrespective of George Eldridge's own assertions that his condition had worsened.

The United States District Court for the Western District of Virginia enjoined the Secretary from withholding disability benefits noting that the Secretary's procedures failed to satisfy due process standards.

Thus, after a *third* hearing before a tribunal, it was again determined that George Eldridge's disability continued, and his benefits should not cease.

SUMMARY OF ARGUMENT

George Eldridge's disability benefits were terminated by the Secretary of Health, Education and Welfare without an opportunity for an evidentiary hearing, even though his disability had been twice found continuing at evidentiary hearings. George Eldridge was thus denied his constitutional due process. While a good volume of the Secretary's brief is devoted to propounding the procedural system of the Social Security Administration and the virtues of the same, it is submitted that it has not shown any justifiable reason for terminating George Eldridge's disability benefits without affording him an opportunity for an evidentiary hearing.

The Secretary has not shown that less stringent due process standards should be afforded Social Security disability recipients upon termination of benefits than those outlined in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The Secretary does not contend that George Eldridge's continued receipt of disability benefits is not a property interest protected by due process considerations (brief, p. 36).

George Eldridge was twice awarded benefits following evidentiary hearings. He had been determined not to be disabled prior to each of the evidentiary hearings. It may be true that "he who giveth may taketh away", but it is respectfully submitted that the taking should be done only after the beneficiary has been afforded an opportunity for an evidentiary hearing of equal import or status as the two prior hearings at which his benefits were awarded.

ARGUMENT

Where a disability recipient is found to have a disability following a "full-blown" evidentiary hearing, benefits should *not* be terminated prior to an equally "full-blown" evidentiary hearing.

The Social Security Administration at no time informed George Eldridge that his condition had improved. Indeed, the Secretary points out in his brief that George Eldridge informed the State Agency that the Agency already had "enough evidence" (p. 8, 11, 34) to show that he was disabled within the meaning of the Social Security regulations. Logically, if one has been determined disabled twice before quasi-judicial administrative proceedings, which entailed an evidentiary hearing, and one is not advised that his condition has improved, then certainly, he reasons, his benefits should not be summarily terminated without the benefit of a hearing of at least equal due process standards as the hearing which had twice awarded him the benefits. It is noted that approximately eighteen months elapsed from George Eldridge's notice in February 1970 that his disability had terminated and the decision of the hearing examiner in May 1971 holding that his disability had indeed not ceased. This was a full eighteen months in which George Eldridge and his children would have been without benefits (to which he was ultimately found to be entitled). Eighteen months for a disabled individual with dependent children is an extremely long time to be summarily denied benefits from a system to which he has contributed.

The Secretary argues that in determining what procedures utilized in denying or terminating statutory benefits satisfy due process, the competing interests must be accommodated. The interests are held by this Court to be:

1. The workers' interest in continued receipt of disability insurance benefits assessed in light of the *reliability* (emphasis added) of the existing procedures and

2. The government's interest in avoiding unneeded administrative burdens and costs that would deplete the ability of the disability insurance trust fund to pay out the maximum proportions of its revenues as benefits to eligible workers.

It is submitted that George Eldridge's case shows and emphasizes the non-reliability of the Secretary's termination procedures. Twice did the termination procedures dictate the termination of benefits and twice were these procedures shown to be inaccurate and wrong after George Eldridge was given a hearing before a hearing examiner.

The Secretary has argued in his brief that disability benefits are unrelated to need, thus distinguishing this case from *Goldberg v. Kelly*. Indeed, a widower shown to be twice totally and permanently disabled, and with dependent children, could hardly be in more need. Not only is a disability recipient unable to seek employment due to his physical impairment, but other assistance programs may well deny benefits because of his potential eligibility to disability benefits through Social Security. The Secretary urges that a worker should avail himself to welfare benefits if they are truly needy. It is submitted that one should not force himself to indigency due to the procedures selected by the Secretary, which procedures he has twice found to be unreliable.

While cross-examination may be of limited value where there is a question which is medical in nature, there can be no question, however, of the value of rebuttal evidence and actual testimony and face-to-face confrontation and viewing of the claimant. An evidentiary hearing, where the claimant himself makes an appearance, gives the decision-maker the opportunity to actually view the claimant and witness his condition, whether it be physical or mental, and allow the claimant an opportunity to present his side of the case.

It is recognized that there are those individuals who qualify for Social Security benefits, who later recover and are able to become gainfully employed. For those who are only temporarily disabled and should be terminated, it is submitted that procedures could be instituted by the Secretary to allow the recipient to elect a hearing or not. If a hearing is chosen, and the disability recipient is unsuccessful, then the overpayment would be recoverable from his future earnings. For those, such as George Eldridge, the success would not be an empty success, which follows financial disaster and resulting emotional calamity.

As pointed out on page sixteen (16) of the Secretary's brief, a claimant must "prove disability". That is, he must prove that he is permanently and totally disabled. This is exactly what George Eldridge did in proving his entitlement to disability benefits. He had been through the entire allegedly "reliable" administrative procedure twice, and twice he had been awarded benefits when the person making the decision saw him and gave him an opportunity to appear before him.

The record does not reveal that an opportunity was ever given George Eldridge to participate in any rehabilitation program. Therefore, it would appear that the discussion in the Secretary's discussion of termination following rehabilitation is totally inapplicable in George Eldridge's case.

It is submitted that the figures quoted by the Secretary on page fifty four (54) of his brief are indeed misleading. Certainly where one must submit birth certificates and where a work record or marriage license is needed to substantiate or justify termination, then no hearing could possibly be beneficial or warranted.

The Secretary points out on page forty (40) of his brief that "termination of disability benefits will ordinarily result only when there has been some distinct change of circumstances." The record is void of any indication of any distinct change in George Eldridge's condition. Indeed, George Eldridge asserted that his condition had worsened. The Social Security Administration termination letter indicated no new medical evidence that his condition had improved. In George Eldridge's case, evidence that his condition had progressed from being unable to engage in any substantial gainful activity to employable was nonexistent.

The United States Court of Appeals for the Fourth Circuit has held that there are four elements of proof to be considered in making a finding of a Claimant's disability under the Social Security Program. In addition to the objective medical facts, diagnosis and expert medical opinions on subsidiary questions of fact and the claimant's education, background, work history, and present age, the Court lists "the subjective evidence of pain and disability testified to by Claimant, and corroborated by his wife and his neighbors" *Underwood v. Ribicoff,* 298 F.2d 850, 851 (4th Cir., 1962). In *Underwood*, the Court stated that "expert medical diagnostic opinion and evidence, alone, may not enable a fact finder properly to determine whether or not such limitation of capacity amounts to disability within the terms of the Act. *Underwood v. Ribicoff,* supra, at p. 852.

The Secretary is urging that the Court in *Underwood* was wrong concerning subjective evidence, or any evidence other than the "cold record." The history of George Eldridge's case clearly shows the importance of such evidence. The Secretary urges that the claimant should be left to the mercy of the reporting doctor's ability or inability to compose a report which will relay the extent of the claimant's disabilities. It is submitted that George Eldridge is statistical proof that such reports do not inevitably suffice in revealing the disability of a claimant.

In arguing that other assistance programs are available for the disability recipient, the Secretary has failed to discuss the eligibility requirements for such assistance. Welfare benefits usually require one to be destitute and without any appreciable assets. This is certainly no acceptable substitute for a worker who suddenly fin himself unable to work and unable to support hims or dependents. As to the alternative benefits available, it is pointed out that:

1. Qualification for welfare benefits may require more stringent standards than qualification for Social Security disability benefits.

2. A welfare recipient may submit his property to a lien for the amount of assistance received.

3. Welfare benefits do not commence spontaneously but rather start after a sometimes lengthy investigation. *Applications of Goldberg vs.. Kelly Hearing Requirements to Termination of Social Security Benefits,* 26 Stanford Law Review 549 (1974).

As stated by this Court, "it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison." *Wolff v. McDonnell* 42 U.S.L.W. 5190 (1974). In *Wolff,* this Court held that, in state prison disciplinary proceedings, an inmate should be allowed to call witnesses on his own behalf when to do so would not jeopardize prison safety or correctional goals. *Wolff,* at p. 5198. In *Wolff,* this Court was dealing with a state prison system and based its decision against the background of the disciplinary procedures required in such an institution. In the case presently under consideration, there is no danger of prison disruption as was present in *Wolff,* supra, and it is submitted that the only disruption is that propounded by the Secretary in his brief which does not appear to be substantiated by the statistics, especially where such a basic constitutional right as due process is concerned. *Goldberg v. Kelly,* supra, at 265.

It is submitted that George Eldridge is as much entitled to an opportunity for an evidentiary hearing concerning his termination of disability benefits as:

1. A welfare recipient concerning his welfare check, *Goldberg v. Kelly,* supra;

2. A wage earner concerning his paycheck, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969);

3. A parolee concerning his freedom, *Morrisey v. Brewer,* 408 U.S. 471 (1972);

4. A prison inmate concerning his good time credits, *Wolff v. McDonnell,* supra;

5. A consumer concerning his old stove, *Fuentes v. Shevin,* 407 U.S. 67 (1972);

6. An uninsured motorist concerning his license, *Bell v. Burson,* 402 U.S. 535 (1971);

7. An elderly person concerning his Medicare benefits, *Martinez v. Richardson,* 472 F.2d 421 (10 Cir. 1973).

8. A student concerning his suspension from school, *Goss v. Lopez* 43 L.W. 4181 (1975).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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May 1975

Mr. Rhinelander. There is no question, Mr. Chairman, that the continuing increases in social security cases will cause even longer delays for the district courts on disposition of social security matters. Just as the Social Security Administration has been required to make adjustment, so will the courts if the backlog is not to become permanent.

Adjustments within the executive branch will continue to be required.

Specifically, the *Eldridge* and *Buffington* cases, ultimately we may find the present social security procedures unconstitutional, then of course social security will have to change fundamentally many of its present claims processing procedures as well as its allocation of resources.

I would say, Mr. Chairman, with respect to the overall problem, looking at this simply from the point of view of cases going into the courts, that there is no simple way to handle this very, very complex problem.

My own view is that Executive and Congress should eventually reexamine the viability and application of the disability concept in the context of an overall review of the income maintenance program.

Specifically, I personally believe—this is not a view of the administration—feel that thought should be given to not including disability if Congress adopts reforms along the line of Mrs. Griffiths' study of a year ago and the one currently in study at HEW.

The reason I reach this conclusion is that the disability standard is one where subjective factors are in the final analysis a significant portion of the decision which has to be made, whether it is in the district office, on reconsideration or by an ALJ. It is a process where consistency of opinions is difficult to arrive at. I think it is also important to note that under the present system I think the incentives are almost to continue up the ladder, if you will.

If denied at the initial stage, it seems to me the incentive is to continue for reconsideration. It is an all-or-nothing proposition. In the VA context where there is a percentage disability, I think the incentives are somewhat different. But here where it is all or nothing and the reversal rate, so called, is quoted at 50 percent, I think the incentives which are driving the system combined with other factors means that the caseload will get heavier rather than lighter.

That concludes my comments, Mr. Chairman, and I or Mr. Dell Acqua or Mr. Gonya would be delighted to answer your questions.

[The prepared statement follows:]

STATEMENT OF JOHN B. RHINELANDER, FORMER GENERAL COUNSEL, DEPARTMENT OF HEALTH EDUCATION, AND WELFARE

I am very pleased to have this opportunity today to speak on matters of great concern to the Office of the General Counsel of the Department of HEW, the Social Security Administration and this subcommittee.

I must preface my remarks by pointing out that I am no longer General Counsel for DHEW. I have very recently begun to serve as Undersecretary of the Department of Housing and Urban Development. However, having served as General Counsel for DHEW from October, 1973 until only a few weeks ago, I feel it is necessary to speak to you today on a few of those matters with which I have dealt so closely for the past two years and which are of major importance to both the Social Security Administration and to me personally. Basically, I would like to discuss two topics. The first concerns the litigation caseload involving Social

Security issues and its impact on the courts. The second relates more specifically to those legal issues before the courts today which may fundamentally alter the operation of several Social Security programs.

DEMENSIONS OF CASELOAD AND IMPACT ON COURTS

Social Security litigation has in recent years undergone tremendous increases in volume. The progressive increase in the caseload can be illustrated by the following figures. In calendar year 1957, only about 80 Social Security cases were filed in the United States District Courts. Five years later in 1962, 644 new cases were filed. By calendar 1972 the number had jumped to 2290. In 1973, total of new cases numbered 2,532, 2,268 of which involved the disability insurance program. In the following year, calendar 1974, a total of 4122 new cases arose. In that year 2534 were disability cases, 320 cases involved other Title II programs. It was in that year that we also saw the beginnings of the vast caseload to come under the Supplementary Security Income and Black Lung programs. Case filings numbered 59 and 1209 respectively. Through August 31, 1975, 4625 new cases have been filed in the district courts this year; 1889 disability, 164 Retirement and Survivors Insurance, 63 Health Insurance, 2453 Black Lung and 56 Supplemental Security Income. At this rate we will see more than 7000 new Social Security actions filed in district courts this year. As can be seen from these figures, the flood of Black Lung cases has begun, while the vast bulk of Supplemental Security Income actions expected this fiscal year have not yet reached the District Court level. Best projections of case filings for fiscal year 1976 suggest that a total of 10,640 new cases will reach the district courts. This total estimate includes an expected 4140 disability cases, 3000 in Supplemental Security Income, 3000 in Black Lung, 270 in Medicare and 230 in other Title II programs.

The production of briefs by the Office of the General Counsel presenting the Secretary's position in each case has been increasing also, but the challenge of keeping current with the caseload has indeed been a major problem. In 1971, 1308 cases were briefed by the Office of the General Counsel. In 1972, 1622 cases; in 1973, 1851; in 1974, 2365; and through August 31, 1975, 2450 cases have already been briefed. It is obvious that a maximum briefing effort must continue to be made by the Office of the General Counsel in order for the Government to keep current with its briefing responsibilities in social security cases.

I might also point out that a secondary source of cases are those which are remanded back to the Social Security Administration by the courts and, as a result, are processed a second time by both the administrative and judicial machinery. The bulk of cases which are remanded are disability cases; and more recently, Black Lung cases reaching the courts are resulting in a high remand rate. The remand figures can conveniently be presented in the context of the affirmance-reversal rates in these cases in past years. In the years prior to the 1967 amendments to the Social Security Act's disability provisions, a total of 6,161 disability cases were considered by the courts, 2,260 affirmed the Secretary's determination, 1,164 cases were reversed and 1.242 were remanded. The combined affirmance rate was 48 percent of all case dispositions on the merits. In 1972, the district courts affirmed 794 Social Security cases, reversed 152 and remanded 257 for a 66 percent combined affirmance rate. In 1973, 1.032 cases were affirmed, 185 reversed and 384 remanded for a 64 percent combined affirmance rate. In 1974, 993 cases were affirmed, 239 reversed and 421 remanded for a 60 percent combined affirmance rate. If the cases which are remanded by the courts are disregarded in determining the rate of affirmances and reversals, the percentage of affirmances in 1972, 1973 and 1974 were 84 percent, 85 percent and 81 percent, respectively.

Black Lung cases have recently begun to be remanded by the courts in very large numbers. Of 1.260 Black Lung filings in 1974, preliminary figures reveal 242 remands in the same period when only 23 cases were affirmed. The reasons for this high remand rate are presently being studied in the Bureau of Hearings and Appeals and the Office of the General Counsel.

The figures relating to new case filings obviously indicate a very significant added burden on administrative and judicial processing of cases over the past few years. In 1973, when 2,500 Social Security cases found their way into Federal district courts, the median time needed for disposal of each case in the courts was 10 months with 10 percent disposed of in 3 months and, at the other extreme, 10 percent requiring 29 months. With an expected four-fold increase in cases this year over 1973, the time needed by the courts to dispose of such an enormous caseload can be expected to increase even beyond the delays that have already occurred. In 1973 the 2,500 Social Security cases constituted about 2.5 percent of the total civil caseload in the district courts. With a four-fold increase of cases, the District Courts can expect that 8–10 percent of all new civil cases will involve social security issues this year.

One measure which has been taken by a significant number of District Courts to cope with the Social Security caseload has been to routinely assign such cases to a magistrate under the provisions of the Federal Magistrates Act of 1968. Currently *Weinberger* v. *Weber*, which involves a challenge to this procedure, is before the United States Supreme Court. The Department of Justice has taken a position of opposition to routine assignments of Social Security cases to magistrates on the basis that the Federal Magistrates Act does not permit such action and legislative authorization will be required before such assignments can be considered proper under the law. As a matter of policy, of course, any procedure that will expedite the handling of the substantial number of Social Security cases in the district courts is highly desirable and, in my judgment, this method of handling the cases merits careful consideration in the future. Generally, the experience which the Social Security Administration has had with magistrates, in my opinion, could only be labelled a satisfactory one.

A high portion of social security cases are disposed of through the summary judgment proceeding on the record without the need for oral argument. There are, however, an increasing number of cases being filed which involve constitutional challenges attacking many aspects of social security programs. These actions are requesting class relief as well as individual relief. These cases will be discussed in more detail later. Such cases will, of course, not be disposed of in as short a time as the more routine cases and represent an additional burden on the judiciary.

As you might expect, a caseload of the dimension I have identified poses an untold number of management problems in its handling. Let me describe just one of these many problems which impacts significantly on DHEW's ability to manage such a caseload and which directly affects the time spent on these cases by the courts as well as the pace at which a case proceeds through the judicial process. I am speaking of the problems encountered in timely responding to a plaintiff's initial pleading. In the past the government's answer to the plaintiff's complaint has very often been delayed because under the law, the Secretary is required to furnish a certified copy of the administrative record, which includes a transcript of the administrative hearing held in each case, at the time the answer is filed. Because of the unprecedented rate at which new social security cases have been filed in recent years, it has become almost impossible for the Social Security Administration to compile a copy of the record fast enough so that the government's answer can be filed within the prescribed sixty day period. As a consequence of the staggering number of administrative transcripts which the Social Security Administration must put together for filing with the Secretary's answer, requests for extensions of time to respond must be filed in a high number of cases. Admittedly, each single request may involve only a few minutes of the court's time, but the cumulative effect of all such requests when faced with a litigation caseload in the thousands, amounts to a significant demand on the courts for this function alone, leave alone the time which the courts spend in reading briefs, hearing arguments, reviewing the record and writing opinions. An increasing number of district courts across the nation are refusing to grant extensions of time in which answers must be filed.

To immediately deal with this problem, arrangements have been made in the Bureau of Hearings and Appeals and in the Office of the General Counsel to handle cases in these districts on a priority basis. Of course, the effect of granting priority to certain cases is to delay other cases and lengthen response times for them. In an effort to alleviate the overall time problem, the Social Security Administration and the Office of the General Counsel have adopted numerous management measures which hopefully will enable those offices to hold requests for time extensions to a minimum. Included in these steps has been the establishment of different arrangements for the compilation and preparation of the administrative record, the implementation of new approaches to the drafting of the government's answer, wider use of paralegals and law students, etc.

To reduce the time necessary for preparing the administrative record, a teletype communications system has been established between the Social Security Division of the Office of the General Counsel in Baltimore and United States Attorneys' offices throughout the country. This system enables United States Attorneys to advise the Office of the General Counsel almost immediately when they have been served with process in a new social security case and as a result permits the Social Security Administration to begin preparation of the administrative record probably a week earlier than if the mails had been used. Numerous modifications have also been made in the various other functions which must be performed in the process of defending each of the thousands of cases I have mentioned. Again, these steps range from wider use of automated office equipment to greater utilization of para-professional staff and involve the combined efforts of the Social Security Administration, the Department of Justice and DHEW's Office of the General Counsel. Some of the possible future management steps under consideration include use of a model complaint for social security cases which would hopefully contain all the information necessary for the prompt preparation of the administrative record in the Bureau of Hearings and Appeals.

The Office of the General Counsel, the Department of Justice and the Administrative Office of the Courts have been working closely together to seek solutions to the problems posed by the social security caseload. Also, in this connection, I had the pleasure nearly a year ago of joining the United States Attorneys at their annual meeting to discuss the caseload problems and how both the Department of Justice and DHEW could work more effectively together to solve them.

I found in my nearly two years as General Counsel that the social security caseload could only be properly managed by constantly appraising the way in which we handled the high volume cases and by making necessary adjustments as expanding caseload demanded. That approach allowed the Office of the General Counsel to keep relatively current in its defense of these matters and yet, in my judgment, did not diminish the quality of the defense being provided the Secretary in suits brought against him under the Social Security Act.

Each case, notwithstanding the heavy caseload and the management measures which must constantly be taken to handle same, still receives individualized treatment including the filing of a brief in each action. I believe this practice is essential if the Office of the General Counsel is to continue to carry out the responsibilities it has in the proper defense of these suits.

RECENT KEY LITIGATION ISSUES

As I mentioned earlier, there has also been an upsurge in the number of cases recently filed by individuals and classes which challenge the constitutionality of various aspects of the social security program. These suits require much more than their proportionate share of both administrative and judicial attention as compared to cases involving more frequently litigated issues such as those involving disability. These types of cases involve key issues to the Social Security Administration and can have the most fundamental impact on the functioning of the various social security programs.

One reason for this increased incidence of challenges which I have observed in recent years is the increasing trend of attorney representation of claimants from the administrative hearing stage through the court levels. In Title II litigation in 1972, 6,160 attorney fee petitions were filed with the Bureau of Hearings and Appeals. In 1973 the figure jumped to 7,555; in 1974 there were 9,815 such petitions and in the first quarter of 1975, 2,820 petitions were filed which is a 10 percent increase over the first quarter of 1974. This is an indicator of increased interest in Social Security litigation by the bar in general and by Legal Aid agencies throughout the country. 42 U.S.C. § 406 provides for the compensation of attorneys in Social Security cases and allows the appropriate district court to set a fee to a maximum of 25 percent of past due benefits and it will then be considered by the Social Security Administration for certification.

Among the most significant of these constitutional cases are those which, in one manner or another, are challenging the delays which applicants encounter at various stages of the administrative process. Class actions have been filed in which plaintiffs allege that they are suffering illegal delays in the processing of their claims from initial applications through the hearing stage of review. These actions, generally speaking, allege violations of the Social Security Act and the Due Process clause of the fifth amendment of the United States Constitution and seek declaratory, injunctive and mandatory relief. A significant majority of cases challenging delays center on hearing delays. Both individual and class actions have been filed to compel the Secretary to provide administrative hearings on Social Security matters anywhere from 30 days to 6 months after a request is filed. These actions variously allege violations of procedural and substantive due process rights under the fifth amendment, rights under § 205(g) of the Social Security Act and § 555(b) of the Administrative Procedure Act. Except for *Santos* v. *Weinberger* in Massachusetts, no decisions have been handed down as yet in related cases. In *Santos*, the District Court has ordered all initial applications on SSI benefits not involving disability or where disability has been determined, under Title II of the Social Security Act, to be processed for payment or denial within 45 days of the initial application. The effect of possible adverse decisions by the courts in these cases will impact greatly on the agency's ability to handle its claim workload.

One line of new case filings which may have a significant effect on the administration of the social security programs involve class action plaintiffs who challenge the lack of an oral evidentiary hearing before benefits received under various programs may be terminated or reduced. This line of prehearing cases usually involve allegations that current administrative procedures present a denial of procedural due process because of the absence of an oral hearing before an action terminating or reducing benefits is taken. Already, at least two District Courts have held present procedures unconstitutional as to individuals. Most of the pending cases have been stayed pending a decision in *Eldridge* v. *Weinberger*, currently before the United States Supreme Court. A decision is expected early next year. The District Court in that action held that present procedures relating to termination of social security disability benefits, which provide for notice and a "paper" hearing, fail to afford constitutional due process. The primary precedent relied upon was the landmark 1970 decision of the Supreme Court in *Goldberg* v. *Kelly*, a case dealing with termination issues in the administration of a welfare program.

A somewhat similar line of cases has developed with respect to the Secretary's authority to recoup overpayments made under the social security programs. Again such cases typically involve allegations of violations of due process in the recovery of overpayments paid under the Social Security Act without affording the recipient an opportunity for a prior oral hearing with the right to personally appear and cross-examine witnesses, to be represented by counsel, to submit documentation, and to examine his or her file prior to the hearing. A major case involving this issue (*Buffington* and *Biner* v. *Weinberger*, (W.D. Wash., CA 734-73C2)), is presently awaiting decision by the Court of Appeals in the Ninth Circuit. Copies of a number of briefs filed in the *Buffington* and *Eldridge* cases will be submitted to you as attachments to this statement.

One additional case worthy of special attention which relates to the "reduction without a hearing" problem is *Cardinate et al.* v. *Mathew* (D. D.C., CA No. 930), wherein plaintiffs attack the Supplemental Security Income regulations (20 C.F.R. §§ 416.1401 et seq.) which allow reductions of benefits in certain situations without a prior hearing as exceptions to a general rule that hearings must first be given. On August 26 of this year the district court issued a summary judgment against the defendant in this action. In its order the court declared invalid and enjoined the operation of three exceptions to the prior hearing rule.

The court further ordered that the Secretary prepare a notice to be sent to all SSI recipients informing them of their right to written reasons for any previous reduction or suspension of SSI benefits. The court further provided that plaintiffs are to have input into how the court-ordered notice is to be worded. A stay and clarification of the court's order is being sought.

Also in the SSI program area, numerous cases have arisen challenging the adequacy of the notices provided recipients relative to the reasons for the adverse action and their subsequent appeal rights.

Another area of recent constitutional litigation centers around the benefit provisions of the Social Security Act and concerns sex discrimination. Recently the Supreme Court in *Weinberger* v. *Wiesenfeld*, found section 202(g) of the Act unconstitutional insofar as it denies, solely on the basis of sex, benefits to widowers with children in their care. Several more recent district court opinions have found other provisions of the Social Security Act which deal with the dependency requirements for husband's and widower's benefits to be unconstitutional. In the view of the reviewing courts the distinctions drawn between the support requirements governing these benfits and those applicable to wives and widows are not rationally based. No doubt this line of cases also will continue to expand until a dispositive judicial precedent is established. A listing of a number of cases in the various areas I have mentioned is included in the appendix which has been compiled for your information and use.

CONCLUSION

There is no question but that the continuing increases in the social security caseload will cause even longer delays for the District Courts in disposition of Social Security matters. Just as the Social Security Administration has been compelled to make many adjustments, so will the courts, if the current backlog is not to become permanent.

Surely, the need for such adjustments within the executive branch will continue to exist. If the courts, in the cases involving the lack of oral evidentiary hearing before terminating or reducing benefits ultimately find present Social Security procedures to be constitutionally inadequate, SSA will have to change fundamentally many of its present claims processing procedures as well as its allocation of resources.

While the measures which have already been taken will aid in coping with the problems I have mentioned, the solution is by no means at hand. Continuing diligence and constant reevaluation of present methods by the executive branch, the Congress and the courts will be necessary to ensure the timely adjudication of cases at all levels.

My own view is that the Executive and Congress should re-examine the viability and application of a disability concept in the context of an overall review of alternative income maintenance programs. Specifically, I believe serious thought should be given to not including disability if Congress adopts fundamental reforms in this area of the type recommended by Mrs. Griffith and under study in DHEW.

I would like to thank you for allowing me this opportunity to speak today. I hope I have provided some information which will prove to be of value to you.

APPENDIX

DELAY CASES

Initial Delays and Delays in General

Santos v. *Weinberger* (D. Mass., 75–166–G)
Wright v. *Weinberger* (N.D. Ill., CA 75C–1537)
Ferguson v. *Weinberger* (C.D. Calif., CV 75–2620–RF)
Huntzman v. *Weinberger* (E.D. Pa., 74–2409)

Hearing Delays

Sturgill v. *Weinberger* (E.D. Ky., 75–288)
Blankenship v. *Weinberger* (W.D. Ky., C75–0185–L(A))
Martinez et al v. *Weinberger* (E.D. N.Y., 73–C–900)
Barnett v. *Weinberger* (D. Vt., 24–270)
Frink v. *Weinberger* (D. Neb., 75–L–15)
Cole v. *Weinberger* (W.D. Mich., K–75–43 CA)
White v. *Weinberger* (D. Conn., H–75–34)
Harris and Velarde v. *Weinberger and Simon* (N.D. Ga., C75–1591A)
Brewer v. *Weinberger* (S.D. Miss., J–75–52(R))
Philbrook v. *Weinberger* (D. Vt., 75–39)

CASES SEEKING RIGHT TO HEARING

Pre-termination hearings

Ramseur v. *Weinberger* (W.D. Ky., C74–344 LB)
Stewart v. *Weinberger* (S.D. Ind., IP75–345–C)
McGowan v. *Weinberger* (S.D. Miss., J–75–13(R))
Simmons et al v. *Weinberger* (N.D. Ga., CA C74–1667A)
Roberts v. *Weinberger* (M.D. Pa., CA 75–159)
Richardson v. *Weinberger* (W.D. Mo., CA 75CV84–W–4)
Wydner and Saffel v. *Weinberger* (W.D. Mich., W75–23CA8)
Mathews v. *Eldridge*, 361 F. Supp. 520, aff'd per curiam 493 F. 2d 1230 (1974). Pending U.S. Sup. Ct., 74–204

Miller v. *Weinberger* (D. Kansas, CA 74–242–C5)
Marrero v. *Weinberger* (D. P.R., CA 74–1347)
Williams et al v. *Weinberger* (D. Fla., CA 74–564–CIV–T–H)

Pre-reduction hearings

Mattern v. *Weinberger* (E.D. Pa., 377 F. Supp. 906)
Naylor et al v. *Weinberger* (D. Utah, CA C–75–194)
Mathews v. *Buffington and Biner* (W.D. Wash., 734–73C2) 9th Circuit appeal pending
Cardinale v. *Mathews* (D. D.C., No. 74–930)

SEX DISCRIMINATION CASES

Jablon v. *Weinberger* (D. Md., K–74–739)
Silbowitz v. *Weinberger* (S.D. Fla., 74–924–CIV–CF)
Goldfarb v. *Weinberger* (E.D. N.Y., 74–C–1188)
Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975)
Kohr v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa., 1974); 95 S. Ct. 2671 (1975)

MAGISTRATE CASE

Weinberger v. *Weber*, 503 F. 2d 1049 (1974).

DISTRICT COURTS NOT GRANTING EXTENSIONS OF TIME FOR ANSWER

N.D. Ala.
N.D. Ga.
N.D. Fla.
E.D. Mo.
W.D. Mo.
S.D. Ohio
N.D. Ohio
M.D. Ala.
D. Utah
D. Md.
E.D. Wisc.

Mr. BURKE. Mr. Steiger.

Mr. STEIGER. Mr. Rhinelander, thank you very much for an almost disheartening statement. Obviously, I don't intend that to be critical of you. But the caseload problem for the Federal courts, I fear, is becoming an almost impossible burden, not because of social security but because of lots of other things that we have done and others are doing.

If you can let me go to a couple of issues which you have raised: (1) What is the Federal Magistrates Act of 1958, why is it different? If so, what does it do for you? And ought we to amend the Social Security Act or the Magistrates Act to allow the courts to do what they are doing on what is now going to be argued before the Supreme Court.

Mr. RHINELANDER. Let me handle part of the question and defer to Mr. Dell Acqua.

I think in terms of the Congress acting, it would be wise to wait and see what conclusion the Court reaches. The issue before the Supreme Court is very narrow, it is one of statutory construction, no constitutional points involved. That seems to be the prudent thing to do, wait until the Court renders an opinion in that case. If it in fact is against the Government, then the position which many of the district courts are following will continue on except on a universal basis. At the moment the practice in the courts is uneven because the Department of Justice has indicated they disagree with the position of many of the judges.

Mr. Dell Acqua can respond better than I can as to what the Magistrates Act is.

Mr. DELL ACQUA. In the act, Congress put that in, and they increased, expanded the role, changed the old commissioners to Federal magistrates, and certain duties that they can perform for the court. But they are not supposed to finally dispose of cases on the merits.

The court has to do that.

There were before special matters which magistrates could do for the court and what we have here is the court's reading of that act and the judicial conference has taken the position that under the amended act the magistrates can handle certain matters, among them social security claims in the district courts. The magistrate would consider the case and make a recommended decision in effect to the judge; the district court judge would either accept that or reject it, have his own hearing on it, argument if he so chose. He is perfectly free to make an independent decision.

What some of the courts have done and what the Justice Department has complained about is a general turnover of these cases to the magistrates. They have a blanket order for handling these cases and the Justice Department feels the statute does not provide for that.

When the act was put in, and subsequently amended, the legislative history is ambiguous on that point. It is not quite clear how far Congress wanted to go with respect to the role of the magistrate.

That is what is before the court now, it is not the constitutional issue. At one time there was a possible concern of article 3, infringement problem with the courts. That is not in the case before the Supreme Court at this time. It is merely the interpretation of the statute.

The experience that we have had with magistrates has generally been fairly favorable. They can in many instances get to the cases more quickly than the district court can, particularly in the heavy districts.

As far as the kinds of opinions we get as against decisions by either one, they follow the general case law and statutory law, so our experience has not been unfavorable in that respect. We have not as a matter of policy been opposing magistrates.

So as far as whether Congress should change the law specifying to make it clear that the courts can do, what some courts are now doing, is something I would defer to your judgment.

Mr. **Rhinelander.** I would add one point, Mr. Steiger, when a case is referred to the magistrate it doesn't remove the judge from the process. It simply means the magistrate makes a recommended decision to the judge. They view this as a better way of managing a heavy caseload.

Mr. **Steiger.** Then, I can take your statement on page 7 to be read in light of the fact that when you label the experience of the Social Security Administration, "a satisfactory one with magistrates," you mean they have followed the law and you are satisfied that they are doing a reasonably good job, not necessarily that they are agreeing with the Social Security Administration.

Mr. **Rhinelander.** No, there are two factors there. Roughly, the percentage of wins and losses, if you will, is about the same. We don't see a great distinction in that case.

And time is involved. We in the Government are as concerned with the long delays in this process as anybody else is. Anything which can in fact speed up the ultimate disposition of the case, I think, is something that ought to be looked at seriously.

Mr. **Steiger.** I appreciate your clarification on that. I wasn't sure how to read that statement when I got to it. That helps me.

You talked also in your statement about the remands back to the appeals counsel by the courts. As you know, that is a matter that has been criticized. Can you give me what the pros and cons are? Are the courts undertaking that kind of effort if the law says you can do it? Should the law continue to say that? Should you change it, modify it?

Mr. **Rhinelander.** Well, I guess it depends on the perspective in which you wish to raise that question. If you look at the heavy caseload problem on the administrative law judge, if you want more cases to come back, it compounds what is already a serious problem and makes it much worse. The figures I quoted with respect to black lung, for instance, I think are a very serious concern because they are not being decided by the courts on their merits but are being sent back to Social Security for a second analysis.

I think you have to be concerned about processing and manageability when you look at this whole spectrum of issues whether it is before the Social Security agency or before the courts.

That is, I think, a factor which is certainly a minus in terms of the remands.

I guess the next question to ask, and maybe I would refer to these gentlemen here, is if the courts didn't have the power to remand, or it didn't have the authority to do that, the question is, would that prohibit courts from remanding? If the authority for remand was deleted from the statute, I am not sure it would. The statute would have to be rewritten to say unless—one way to do it—there would be many ways, but unless the court were to decide that the record did not have substantial evidence to support the Secretary, they would have to affirm the Secretary's ruling.

I am not sure how you would handle it if the Congress were to wipe out remands. I don't know if there are further thoughts to be put out here.

Mr. **Gonya.** As you indicate, the remand provisions now are in the Social Security Act. Absent that, I think we have the question still as to permissibility of remands under the Federal Rules of Civil Procedure and whether that approach would still be available.

But recognizing the time delays which are being experienced in certain courts before they get to these cases, there is always the possibility of new evidence being obtained and new circumstances coming about, worsening of a condition which then if it had not been before the Secretary when he made a final decision, the court would say that that should be properly remanded to the administrative agencies in light of that information.

Mr. **Rhinelander.** Because of the sheer volume of cases, the General Counsel's office in Social Security is not able now to screen all these cases that come before it. It used to be that in preparing the brief they would make a decision as to whether or not the case was defensible or seek a remand on their own initiative. I think that that is more difficult to do when the caseload jumps from 2,000 to 10,000 cases.

It may well be that up to a certain volume, we could screen out some of those cases. I think you would have to look at it in terms of the context of over 10,000 cases going into the courts.

I have not really thought about repealing that, whether it can be done consistent with the civil rules or whether you would have to exclude it from general practice.

I think you have to be as concerned about what that does to the courts as what does it do to Social Security? While we may unburden the Social Security agency, if we increase the burden on the Federal courts, that would be a matter of great concern to me.

Mr. **Steiger**. One last question if I may. You talk about the increase in attorney fee petitions. This is page 13 of your statement.

I don't know how to phrase this just right. Is this a serious problem? Is it becoming more of a problem? Is the 25-percent maximum figure now in the statute reasonable or not reasonable?

Do you have any thoughts, comments, recommendations, or ideas on that issue? I raise it at some risk because I am asking a lawyer to respond. So I will ask you to put on your secretarial hat instead of your General Counsel hat to deal with that.

Mr. **Rhinelander**. My statement was intended to be neutrally phrased and simply to recite the fact that more and more claimants are being represented by attorneys in the process. I think it is a factor, there are more cases, of course, but there is an increased percentage going up to review. If your question is, should individuals have the right to be represented, my answer to that has to be yes. If the question is, should attorneys who represent claimants have a right to a fee of a certain amount, my answer would have to yes, also.

But whether 25 percent is the best figure as public policy, whether or not it is abused, I just don't know the answer to that question.

I think it is true though that more and more attorneys familiar with and focusing on the social security litigation, particularly disability cases, can if they are working on what in effect is a contingent fee basis, I think the incentives are to take the case absolutely up to the ALJ level or in fact go to the district courts. So you have these factors which are propelling what is a caseload growing for additional reasons.

But the alternatives of saying you cannot be represented or if you are represented the individual who represents you cannot be paid, I think are harmful from the public policy point of view. That comes from policy concerns, not from my being a lawyer.

Mr. **Steiger**. But the question arose in the black lung program where you have had indications of some fairly serious abuses by lawyers in that program. That created some real problems.

Mr. **Rhinelander**. I agree with that, but addressing the larger questions, Mr. Steiger, I think it is a problem of whether or not then with reasonable allocation of resources the Social Security can police that to avoid the abuses that had previously shown up.

Mr. **Steiger**. Thank you very much.

Thank you, Mr. Chairman.

Mr. **Burke**. Mr. Archer?

Mr. **Archer**. I have no questions, Mr. Chairman.

Mr. **Burke**. You state that the 60-day limit on filing an answer to the claim in court is giving administrative headaches. Is that a statutory provision or in the Federal rules?

Mr. **Rhinelander**. No; it is in the Federal Rules of Civil Procedure, and the Social Security Act provides we must file with the answer a certified copy of the transcript. When I first came to HEW in October 1973, one of the first things I began to look at was this volume, and what I thought was a heavy volume then is nothing compared to what is a heavy volume now after I have since left there.

Because of the fact that we were not meeting that 60-day deadline in even half the case, we considered the possibility of legislation, extending that time, say, 120 days or possibly seeking changes in the rules of the court, civil rules or local rules.

I must say from a public policy view, I think it is the wrong thing to seek further time in this process, so we did not go that way. Our efforts have been to do better in terms of meeting it. But the simple facts of life are that we cannot get all the answers to the court within 60 days.

Let me just point out——

Mr. BURKE. Is it because of a lack of personnel?

Mr. RHINELANDER. It involves several things. First of all, the transcript is not prepared until after a lawsuit has been brought. We have got literally thousands and thousands and thousands of transcripts taken on tape but they have not been typed and they would not as an ordinary course be typed unless a case is brought in court.

Mr. BURKE. How much notification do you have before it is brought to the courts?

Mr. RHINELANDER. Well, the plaintiff in the court proceeding has 60 days from the final decision of the agency. We don't know what individuals who have been turned down at this step will in fact go into court. The cost involved of transcribing all transcripts would be——

Mr. BURKE. Is it 60 days after he files it with the court?

Mr. RHINELANDER. Well, he has 60 days to file after the final administrative decision. Then we have 60 days from the service to file the answer. Because only a small percentage of the eventual denials are ultimately taken to court, Social Security has made the decision they will not type up all transcripts. I think that is probably a sensible position. The cost of preparing transcripts in perhaps 90 percent of the cases where no further action is needed would be unnecessary and a wasteful step.

Mr. BURKE. But you do know the specific case once it is filed in court. What is your problem there then?

Mr. RHINELANDER. Let me recite part of it. One of the simple problems is being notified back in Baltimore where all the files are that we have actually been sued. When I first looked at it we found it averaged between 7 and 10 days from the time a case was brought against the Government before we learned about it in Baltimore. My prepared statement gets into that and I skipped over it. But we have a teletype machine now installed in headquarters Baltimore and all U.S. atorneys' offices and we requested them to notify us the same day by teletype that a case has been brought, listing the social security number of the claimant so we can begin immediately the retrieval process and the transcription of the record.

But when you are dealing with the very large numbers that we deal with and you go through the various steps including the mailing time, the time it takes to mail something between Baltimore and Kansas City or Baltimore and San Francisco in terms of making a

60-day time frame, those mailing times are absolutely critical and when you add the various steps together, teh time it takes to get a document prepared in Baltimore to the U.S. attorney who has to get to the courthouse, 60 days isn't enough. But I——

Mr. **Burke.** Now that they are notified by teletype, how soon do they get the documents in court?

Mr. **Gonya.** As a result of the installation of the teletype equipment, in those U.S. attorneys offices that have such facilities, we are now saving within the 60-day period, probably up to a week. It has made a considerable impact on our ability to respond within the 60 days.

But there are still the additional problems of preparing the administrative record within the permissible time period which would include the transcription of the verbatim record, of the ALJ hearing. That still requires a substantial period of time before it can be put into the record which we would use to prepare our answer in the Office of the General Counsel.

Mr. **Rhinelander.** Let me add a further detail, Mr. Chairman, but details are terribly important in this whole thing.

Mr. **Burke.** First, you indicated that typing up of that transcript was the cause of the delay. Now you are telling me there are other developments there?

Mr. **Rhinelander.** There are a series of problems. Notification; it is the fact that in a significant percentage of the complaints filed in the district court the social security number of the individual is not listed. Our retrieval system is much better where we have a social security number than if we don't have it. There are a lot of people with the same name and if you don't have that same number that causes a problem.

Locating the transcript, getting it typed; it is typed in a different place from where it is located, getting it back, located, Xeroxed, getting it to the attorneys so they can prepare an answer—there is a series of steps, each of which takes time and when you have to mail it to the U.S. attorney's office so he can get to the courthouse before the 60th day, time is running against us when we deal in this volume.

Mr. **Burke.** I can understand if you are depending on the post office.

Mr. **Rhinelander.** Those delays kill us.

Mr. **Gonya.** We have to put that in the mail along with the answer so at the end of the process we don't have the availability of the teletype system as we do on the front end of it.

Mr. **Rhinelander.** As a policy of——

Mr. **Burke.** You more than likely need 20 days more just for the post office to mail it back and forth.

Mr. **Rhinelander.** You need a good 7 days there to be safe. We have moved toward electronics in terms of the teletype, in terms of the magnetic typewriters which store standard paragraphs and we really are trying to implement as may time-saving labor-saving devices that we can to get on the top of the process. But I would like to stress that this enables us to perhaps stay even but as the caseload goes up it doesn't enable us to get really to improve significantly our time. That is the central problem, of course.

Mr. **Burke.** You don't think it is a shortage of personnel, then? Would that be the problem?

Mr. Rhinelander. Well, in terms of our processing cases—speaking in my former capacity as general counsel—at this stage in terms of getting the answers it is not a shortage of personnel in the General Counsel's office. That office doesn't do a lot of the preliminary work. The administrative work is done in social security as such, preparing the record, et cetera, et cetera. I think Mr. Trachtenberg, who was here last week, or 2 weeks ago with Mr. Cardwell, has taken a series of steps in the Bureau of Hearings and Appeals which will help the General Counsel's office get this process done quickly.

Mr. Burke. I am referring to your office now, not Trachtenberg's.

Mr. Rhinelander. As the caseload increases this would be the problem. There is clearly a need for more people in that case. If we continue briefing every case and if the caseload goes up by 2,000 to 3,000 cases a year, clearly that means there will have to be additional attorneys, paralegals or whoever, working under supervision of attorneys to work on that load. That is one of the—in terms of preparing and justifying the budget—that is the difficult thing to do. We can predict well what we need in terms of staff in the General Counsel's office to handle this part of the work.

Mr. Burke. How many cases do you average a month?

Mr. Rhinelander. The figure we are looking at now is 7,000 being filed this year, it is increasing on the curve, so there will be more in December than January.

Mr. Gonya. If I might illustrate, in the month of August, an unprecedented 502 briefs were prepared by our staff. Notwithstanding the fact we reached that level, there were 644 new cases filed that month. So even with that effort we fell short by nearly 150 cases.

Mr. Burke. Do you think you are doing a good job at that level? Do you think you did a good job on those 500 cases?

Mr. Rhinelander. Oh, I think the quality of—let me emphasize, Mr. Chairman, these cases we are talking about in 85–90 percent of the cases are not complicated legal cases in terms of constitutional questions or questions of law.

They are really questions of fact. The briefs, I think the essential element of the brief is to digest, if you will, from the administrative record, the key facts which support the position of the Government.

Mr. Burke. Are there any suggestions that any one of you three gentlemen can make in addition to what you have already said that can help solve some of the problems we are confronted with in your areas? Anything you have not mentioned?

Mr. Rhinelander. As long as the statute remains the same, I think it is simply a question of taking a great many incremental steps which will help speed up the process, keep some cases from going up the level, perhaps having a decision at an early stage.

I think that between the Social Security Administration, HEW, the

U.S. attorneys, Department of Justice, all the examination of these questions have been given and there is no cataclysmic way in which we can solve the problem in one fell swoop. I think it is the smaller steps that would have a cumulative effect on solving the process.

Mr. Burke. Maybe if you had one nonlawyer in that group you would be able to make that move faster.

Mr. Rhinelander. Well, there are a lot of nonlawyers in social security.

Mr. Archer. We heard several allegations this morning that the answer to the problems that you face administratively is better training of your personnel. Would you like to comment on that?

Mr. Rhinelander. I guess I could have no argument with better training in principle. I don't have an argument with that testimony this morning. My argument goes to the process as it moves into the courts. There I think our personnel are doing very well. I think the great improvement in what we are doing is on the management side, using electronics and these factors that will help.

I think I would——

Mr. Archer. I suspect it is the process before it gets to you.

Mr. Rhinelander. Yes; the initial decision stage, the review stage, appeal stage, and that creates problems in itself.

Mr. Archer. You would not be in a position to comment on the preliminary stages before it gets to your level?

Mr. Rhinelander. No; to be frank, I have worked closely with Mr. Cardwell and Bob Trachtenberg, who are really looking at this, and for about 3 weeks my mind has focused on other matters and I wouldn't be in a good position to comment. But I would stress I don't think there is a single step, as opposed to a handful of steps, that will do this. More training, assistants for ALJ's, sufficient clerical staff, means of moving documents and, if you can avoid the use of the mails, that is the best way to do it. All these are important steps. I guess my concern is that if the caseload continues to go up, and it looks like it will go up and I don't know how far it will go up and I don't know if the projections will flatten out eventually, but in dealing with the increase in caseload, I think we are dealing with a process which is unique. I don't know of any system that has to handle this volume of individual matters particularly where the ultimate decision is so subjective.

Mr. Archer. Thank you.

Mr. Burke. We wish to thank you for your appearance here and if you have any further suggestions we will be glad to hear from you.

The next group—and if you will just sit around the table—is a joint appearance of Herbert Brown, Mrs. Marie Clark, Joseph Gaughan, Sidney Houben, B. J. Marett, Morris Sorenson, and Glen Swisher.

PANEL CONSISTING OR HERBERT L. BROWN, DIRECTOR, DISABILITY DETERMINATION SECTION, NASHVILLE, TENN.; MARIE A. CLARK, SUPERVISOR, DISABILITY DETERMINATION SERVICES, CHEYENNE, WYO.; JOSEPH A. GAUGHAN, ASSISTANT DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION, DISABILITY DETERMINATION DIVISION, HARRISBURG, PA.; SIDNEY HOUBEN, DIRECTOR, BUREAU OF DISABILITY DETERMINATIONS, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; B. J. MARETT, DIRECTOR, DISABILITY DETERMINATION SERVICES, VOCATIONAL REHABILITATION DEPARTMENT, COLUMBIA, S.C.; MORRIS E. SORENSON, COORDINATOR, DISABILITY DETERMINATION SERVICES, DIVISION OF REHABILITATION SERVICES, UTAH STATE BOARD OF EDUCATION; AND GLEN SWISHER, ADMINISTRATOR, DISABILITY DETERMINATION PROGRAM, STATE OF MISSOURI

Mr. BURKE. Do all of you have prepared statements?

Mr. STEIGER. Yes; we have read them all.

Mr. BURKE. You may summarize and your entire statement will appear in the record. In the interests of time the committee would appreciate if you would summarize the high points of your statement, and then the committee will ask questions.

We will start off with Mr. Brown. Identify yourself for the record, please.

STATEMENT OF HERBERT L. BROWN

Mr. BROWN. I am Herbert L. Brown, director of the Disability Determination Service, Nashville, Tenn. I have been with the State agency 20 years; I have been director of the program for the last 17 years. I would limit my summary, as my prepared statement outlines, to three areas, the hearings and appeal, State agency expedients, and something else I call the State agency perspective.

You are well aware that statistically the claimant's chances of a favorable decision are best at the hearing level where he has about a 50 percent chance of a favorable decision. This is in contrast to 40 percent chance of a favorable decision at the initial level and only 30 percent chance at the reconsideration level. In my opinion, the primary reasons the cases are reversed at hearing are: (1) The claimant's condition has worsened during the long wait for the hearing; (2) more liberal criteria is used in reaching the decision; and (3) the ALJ's are not required to meet goals regarding processing time or limitations on the purchase of special exams. Until the ALJ's decisions are brought in line with criteria used by the State agencies, a claimant would be foolish not to pursue his claim that far.

Apparently, the SSA's appeal procedures are, to a great extent, controlled by the Administrative Procedures Act, whereas, the Veterans' Administration follows what seems to be a much simpler, quicker procedure of reviewing adverse decisions. It seems a terrible waste of time and money to have an administrative law judge, whose salary is $30,000 a year or more, reviewing a disability examiner's decision in Tennessee, whose salary is only $10,000 a year. I submit that it doesn't take a Philadelphia lawyer to give a claimant his day in court.

Mr. BURKE. We will go answer the quorum and we will come right back and there will then be no interruptions.

[A recess was taken.]

Mr. BURKE. You may proceed, Mr. Brown.

Mr. BROWN. Mr. Chairman, I will hurry through this and conclude in a couple minutes.

Mr. BURKE. Just so long as you hit the highlights of your prepared statements. We don't want you to rush too much, but the important thing is to get the highlights of your testimony in here and we will study over all your entire testimony.

Mr. BROWN. The hearing crisis is just one of several that social security is experiencing, most of which can be traced to the addition of programs such as black lung and supplemental security. As I recall, the program prior to 1970 had no crises of this magnitude. The solution seems obvious. The current backlog of hearing cases must be reduced while current hearing requests are handled some new and different ways. Even if more and higher paid ALJ's are the answer, time is not on our side.

I would propose to you that social security hearings be removed from the requirements of the Administrative Procedure Act, however that could be handled, and that social security move with all deliberate speed to adopt the reconsideration interview study as a permanent procedure. If after the informal hearing and evidence-gathering interview conducted by the State agency at the reconsideration level the claimant still is not satisfied, rather than subject him to the long, expensive process of a hearing, have his claim reviewed by a three-member panel which has power to remand for more evidence or another personal interview, but whose decision is not subject to court review.

The panel would consist of a disability examiner, an attorney, and a physician. This follows to some extent the procedure followed by the Veterans' Administration.

I would like to skip over the State agency expedients, which involved our staff visiting the ALJ offices and looking at 800 claims and seeing only 18 we could reverse. We now have an informal remand procedure where we have looked at some 300 cases and only 7 or 8 percent, after additional development have we been able to reverse.

It is a little too early to make evaluation of that. It does not seem to be very productive at this time.

Finally, I would like to move to the last item in my presentation and that is the State agency perspective, which is really of major concern to me because of the effect the solution to the hearing crisis will have on the State agency. Within recent years so much responsibility that was previously thought to be in the Federal domain now resides with the States.

Responsibility for total medical development, the major portion of vocational development, major responsibility for the final decision including quality assurance, denial letters, et cetera, has brought the State agencies out of the shadows to the point that we are now responsible for perhaps 80 percent of the total disability process. This gives us a feeling of being taken advantage of which is depicted very vividly by the attached cover of the most recent NADE "Advocate," the official publication of the National Association of Disability Examiners, and I frankly share that opinion.

A feeling exists, perhaps in the Congress, that all that is necessary is to make more money available to the States, increase the staffing ceiling, give them not quite enough time and they can take care of the additional work. I submit to you that we feel strongly that we are being taken advantage of when the work and responsibility previously done by our Federal counterparts is transferred to us whose pay grades are consistently and considerably below the Federal level. In actual practice we are given the Federal authority to hire the staff and spend the money, but we are all too often unable to secure approval through State officials.

We have two examiner levels, one for processing initial claims, a higher, more experienced level for reconsideration claims. We have initial examiners processing reconsideration claims and hearing remands State officials will not allocate sufficient positions at the reconsideration level.

Our employees, who are already paid far below their Federal counterparts, received a 2.5 percent across-the-board salary increase this year and will not be eligible for merit increases. We have the money, but we must adhere to State practices and procedures as long as we are State employees.

State officials delayed our acquisition of new space in 1973–74 so that it took us 15 months to get underway with the SSI program. So, you see, Federal money and Federal authority frequently do not get the desired response at the State level.

I have cited only two examples of many. I could have mentioned problems in securing out-of-State travel.

While I am talking about perspective, I would like to point a finger to my Federal counterparts and insist that some order be restored to the method and timeliness of social security's instruction to us. I do not know when the Congress passed Public Law 93–579—the Privacy Act of 1974. I only know that on Thursday afternoon, September 25, 1975, we received two advanced copies of Disability Insurance Letter II–61, 37 pages of instructions, and we had slightly more than 1 day to implement it. Noncompliance could result in a fine of not more than $5,000. Gentleman, we deserve better than this.

Thank you, Mr. Chairman.

[The prepared statement follows:]

Statement of Herbert L. Brown, Director, Disability Determination Section, Nashville, Tenn.

Mr. Chairman, I appreciate very much being asked to appear before the Subcommittee to make whatever contributions I can. I have been employed by the Tennessee State Agency for 20 years and have been Director of the program for 17 of those years. This is my first opportunity to appear before a committee and I have looked forward to it very much. I would like to limit my remarks to about three areas:

1. Hearings and Appeals Process;
2. State Agency Expedients; and
3. State Agency Perspective.

HEARINGS AND APPEALS PROCESS

You are well aware that statistically the claimant's chances of a favorable decision are best at the hearing level where he has about a 50 percent chance of a favorable decision. This is in contrast to 40 percent chance of a favorable decision at the initial level and only 30 percent chance at the reconsideration level. In my opinion, the primary reasons the cases are reversed at hearing are: (1) the claimant's condition has worsened during the long wait for the hearing; (2) more liberal criteria is used in reaching the decision; and (3) the ALJ's are not required to meet goals regarding processing time or limitations on the purchase of special exams. Until the ALJ's decisions are brought in line with criteria used by the state agencies, a claimant would be foolish not to pursue his case that far.

Apparently the SSA's appeal procedures are, to a great extent, controlled by the Administrative Procedures Act, whereas the Veteran's Administration follows what seems to be a much simplier, quicker procedure of reviewing adverse decisions. It seems a terrible waste of time and money to have an Administrative Law Judge, whose salary is $30,000 a year or more, reviewing a disability examiner's decision in Tennessee, whose salary is only $10,000 a year. I submit that it doesn't take a Philadelphia lawyer to give a claimant his "day in court."

The "hearing crisis" is just one of several that Social Security is experiencing, most of which can be traced to the addition of programs such as Black Lung and Supplemental Security. As I recall, the program prior to 1970 had no crises of this magnitude. The solution seems obvious. The current backlog of hearing cases must be reduced while current hearing requests are handled some new and different way. Even if more and higher paid ALJ's are the answer, time is not on our side.

I would propose to you that Social Security hearings be removed from the requirements of the Administrative Procedures Act, however that could be handled, and that Social Security move with all deliberate speed to adopt the Reconsideration Interview Study as a permanent procedure. If, after the informal hearing and evidence gathering interview conducted by the state agency at the reconsideration level the claimant still is not satisfied, rather than subject him to the long, expensive process of a hearing, have his claim reviewed by a three member panel which has power to remand for more evidence or another personal interview but whose decision is not subject to court review. The panel would consist of a disability examiner, an attorney and a physician. This follows to some extent the procedure followed by the Veterans Administration.

No doubt there will be opposition to removing Social Security hearings from Administrative Procedures Act control. The additional work invloved in reconsideration interviews will not be welcomed in many state agencies, mine being one. But until fewer cases (reduced percentage) are reversed at hearing there is no way to head off the requests short of eliminating the procedure. A reduction in my opinion could be brought about by the ALJ's adhering to the same criteria used by the states. I would guess that many of the ALJ's reversals would not hold up as an allowance in a state agency.

STATE AGENCY EXPEDIENTS

Tennessee State Agency personnel recently visited the hearing offices in Knoxville and Nashville to review the backlog of hearing cases for which hearing dates had not been set. We reviewed the cases using the criteria we normally used on cases and found we could only reverse 17 out of 800. We obviously did not think this very productive.

We are currently involved in the informal remand procedure and our experience to date is too limited to draw any firm conclusions. To date, after 7 weeks experience, we have processed to completion 152 remand cases (98 DIB and 54 SSI), and have reversed only 13 for 8.5 percent. Whether this rate will hold up and whether this is a worthwhile effort remains to be seen. We did some additional development on 98 of these cases and on the remaining 54 we felt comfortable with the evidence knowing they were going to hearing. If either group is delayed the customary 6–8 months prior to hearing, many of them will be returned to us by the ALJ for current medical development either prior to or subsequent to the hearing. Regardless of how well we may have documented the case at reconsideration, a substantial delay will inevitability require updating

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the medical at hearing. This becomes very expensive due to the extensive consultative examinations usually requested by ALJ's.

During the first 3–4 weeks of the informal remand study we were making extended telephone contacts (15–45 minutes) with the claimants in all cases. We are now screening the cases to identify those which show little likelihood of reversal. This screening now takes place before or after the telephone interview and at any other point that further development appears futile.

This process is being carried out in one of our 3 reconsideration units with some enthusiasm and a great deal of satisfaction on the part of the staff. They report a good, helping relationship is established with the claimant in most cases which leaves the claimant with the impression that someone is concerned about him and his claim, in other words, a "friendly decision". Only one negative reaction was reported.

As a part of this study requests from ALJ's for medical development (consultative examinations) are reviewed following procurement for possible reversal if the hearing has not been held. It seems that hearings have already been held on most of these prior to securing the examinations. We have been able to reverse only 9 cases out of 222 reviewed to date or 4 percent. This too seems rather unproductive for the time involved.

Our examiners report good cooperation on the part of district office personnel and some apparent lack of understanding and resistance on the part of the ALJ's regarding the informal remand procedure.

One problem we find in processing reconsiderations and informal remand claims is the short period of time from initial denial to reconsideration and from reconsideration denial to hearing request. A random sample of 20 remand cases showed that in 9 of the 20 the hearing request was filed 30 days or less from the date on the recon. denial notice. If the claims are well developed and documented and the proper decision rendered at one level, with such a brief passage of time there is little likelihood of a favorable decision. It is not rare for an individual to be denied twice within the same month. The claimant may think he is getting a "fast shuffle" to be denied benefits twice in rapid succession and he may be. The unending pressure to process cases cannot be adequately described.

STATE AGENCY PERSPECTIVE

One of my concerns is of course what effect the solution to the "hearing crisis" will have on the state agency. Within recent years so much responsibility that was previously thought to be in the federal domain now resides with the states. Responsibility for total medical development, the major portion of vocational development, major responsibility for the final decision including quality assurance, denial letters, etc., has brought the state agencies out of the shadows to the point that we are now responsible for perhaps 80 percent of the total disability process. This feeling of being taken advantage of is depicted very vividly by the attached cover of the most recent NADE *Advocate*, the official publication of the National Association of Disability Examiners, and I frankly share that feeling.

Another feeling exists, perhaps in the Congress, that all that's necessary is to make more money available to the states, increase the staffing ceiling, give them not quite enough time and they can take on the additional work. I submit to you that we feel strongly that we are being taken advantage of when the work and responsibility previously done by our federal counterparts is transferred to us whose pay grades are considerably below the federal level.

In actual practice we are given the federal authority to hire the staff and spend the money but we are all too often unable to secure approval through state officials. We have two examiner levels, one for processing initial claims, a higher, more experienced level for reconsideration claims. However, we have initial examiners processing reconsideration claims because state officials will not allocate sufficient positions at the reconsideration level. Our employees, who are already paid far below our federal counterparts, received a 2½ percent salary increase this year and will not be eligible for merit increases. We have the money but we must adhere to state practices and procedures as long as we are State employees. State officials delayed our acquisition of new space in 1973–74 so that it took us 15 months to get underway with the SSI program. So, you see, federal money and authority frequently do not get the desired response at the state level. I have cited only two examples of many. I could have mentioned problems in securing approval of out-of-state travel.

While I'm talking about perspective, I would like to point a finger to my federal counterparts and insist that some order be restored to the method and timeliness of Social Security's instruction to us. I do not know when the Congress passed Public Law 93–579 (The Privacy Act of 1973). I only know that on Thursday afternoon, September 24, 1975, we received two advanced copies of Disability Insurance Letter II–61, 37 pages of instructions and we had slightly more than 1 day to implement it. Noncompliance could result in a fine of not more than $5,000. Gentlemen, we deserve better than this. Thank you, Mr. Chairman.

Mr. BURKE. Thank you.

Mrs. Clark?

STATEMENT OF MARIE A. CLARK

Mrs. CLARK. Mr. Chairman, members of the subcommittee, I would like to address my remarks——

Mr. BURKE. If you would just identify yourself for the record please.

Mrs. CLARK. I am Marie Clark, supervisor of the Disability Determination Services, Cheyenne, Wyo. I have been a DDS employee for the past 15 years, the past 6 as supervisor. I think federalization of the DDS would bring comprehensive improvement to the entire DI process. It is equally important to stress service and equity to claimants at the initial level where about 96 percent of all disability claims are decided as it is to concern ourselves with the 4 percent which reach the hearings level.

I think the claims become involved in an incredible administrative ping-pong game when they are filed. They are kicked back and forth between State and Federal offices until the claimants don't know where to go for help in pursuing their claims. Individuals should have personal contact with disability evaluators when their claims, are filed to be sure that the issues they wish to present are clearly defined, and so the medical reports secured for their files reflect full and complete medical information.

In denial cases, a brief summary of the issues, the evidence and the reasoning should be provided to the claimants. This should result in fewer requests for reconsideration and those individuals filing for reconsideration and those individuals filing for reconsideration would be better prepared to pursue their claim at an earlier date, thus preserving the issues and providing for shortening of the time frame for filing requests for reconsideration without visiting injustices on the claimants.

At the reconsideration level continued contact with expert disability personnel in identifying and developing information relating to the specific areas of disagreement would further refine the issues and an affirmation would be more acceptable to claimants who had had every opportunity to present their case, including an option for a face-to-face denial interview with the decisionmaking agency.

Relatively few cases should go on to the hearings level. The majority of claims pending at the hearings level involve interpretation and consideration of nonmedical factors. While BDI provides guidelines for these factors, the authority to follow through with field offices in application of these guidelines is blocked by the present administrative system which transfers the administration of DI field staffs to a variety of parent agencies in the States, primarily divisions of vocational rehabilitation.

Were Federal guidelines monitored by direct-line BDI administration, uniform application of nonmedical criteria and other standards would correct the inequities to the claimants and would nullify the tendency to pay benefits for premature retirement or unemployment instaedo f true inability to work at SGA. The increasing independence of State disability offices has raised serious questions of program stability and claimant equity.

For example, BDI issued DIL-II-59 giving directions for the third and ongoing phase of a concerted BDI-BHA administrative effort to provide relief for cases involving potential allowances being unnecessarily delayed at the hearings level. Phase II had operated with no serious problems for several months. Although the action had escaped the attention of CSAVR—the Council of State Administrators of Vocational Rehabilitation—the DIL did not and the Council requested a DVR order for State DDS, to cease and desist the activities in processing these remand claims. Not all DVR directors acquiesced, but some did and for a time we had a situation where some States were processing remand cases while some were refusing to implement DIL-II-59.

The implication for involvement of legal services in bringing class action suits on behalf of claimants denied services because of arbitrary State interference in the Federal disability system is apparent. This problem was resolved and the program direction has been implemented in all the States this time.

The lesson, however, should not be ignored. State administration does not advantage the claimants. It provides only complicated procedures when simplification is desirable. It wastes time when expeditious action is needed and it drains off millions of social security and general tax dollars for support of levels of State administration above the DDS's and other State agencies which are unnecessary for and unrelated to the disability process.

The DDS's are totally federally funded and exist solely to function in the Federal DI system. If overall program improvement is to be achieved, their capacity for service in the system should be maximized for the benefit of the claimants and the program by shifting them into direct line Federal administration under BDI.

Thank you, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF MARIE A. CLARK, SUPERVISOR, DISABILITY DETERMINATION SERVICES, CHEYENNE, WYO.

Mr. Chairman and members of the subcommittee, Thank you for inviting me to share my views on factors contributing to the current backlog of claims at the Hearings level and to offer suggestions, which in my opinion, would improve the entire process of determining disability under the Social Security and SSI programs.

I believe that federalization of the total disability system would provide comprehensive improvement to the entire decision-making process and would enhance claimant satisfaction with and trust in Social Security. It is equally important to stress service and equity to claimants at the initial level where about 96% of all disability claims are decided as it is to concern ourselves with the 4% which reach the hearings level.

When an application for disability benefits is filed, the claim becomes enmeshed in an incredible administrative Ping-Pong game. To the federal SSA offices for filing. To the state agencies for development and determination. Back to the federal offices for notification and an explanation of what the state agency did. Reconsideration—initiated at federal level. Back to the state for redevelopment and redetermination. Notification goes back to the federal site—or is it the state, masquerading in federal stationery?

Claimants are understandably confused about where to seek help and advice in pursuing their disability claims. The program is federal. It follows that the field offices responsible for developing the disability claims and making the decisions should be federal, too.

Claimants should have the advantage of contact with skilled disability evaluators at the time applications are filed. They are entitled to a full explanation of the law and regulations governing disability benefits so that their rights and responsibilities may be fully understood and so that misconceptions will be cleared before the process starts; claims for temporary or partial disabilities, or claims being filed solely to satisfy requirements of other programs could be discontinued. Claimants are entitled to expert assistance in stating their problems to assure the issues they wish to present are fully and completely defined. And they are entitled to the benefit of discussing the history of their illness or injury with personnel trained in developing medical evidence so that the reports secured for their file reflect full and complete medical information.

In denial cases, a brief summary of the issues, evidence, and reasoning should be furnished the claimant.

I believe this would result in fewer requests for reconsideration, and that individuals filing for reconsideration would be better prepared to pursue their claims at an earlier date, thus preserving the issues, and providing for shortening the time frame for filing requests for reconsideration without visiting any injustice on the claimant. At the reconsideration level, continued contact with expert disability personnel in identifying and developing information relating to specific areas of disagreement would further refine the issues, and an affirmation would be more acceptable to claimants who had had every opportunity to present their case, including an option for a face-to-face denial interview with the decision-making agency.

Relatively few cases should require the hearings level to resolve continued controversy. But in those cases which do, the evidence would have been gathered and submitted in a fully developed file by a federal agency and would meet the APA requirements for "on the record" adjudication by an ALJ.

The majority of claims pending at the hearings level involve interpretation and consideration of non-medical factors. While BDI provides guidelines for evaluating the factors of age, education, work-experience, training, and transferability of skills, the authority to follow through with individual DDSs in the application of these guidelines is blocked by the present system which transfers the administration of DDS staffs to a variety of "parent agencies" in the states, primarily divisions of vocational rehabilitation. As increasing program authority has been invested in the state agencies, and there is no longer a 100% BDI review to exert a restraining influence on innovative interpretations of non-medical criteria, it has been possible for DDSs to modify the rather strict federal concepts of total disability to conform more closely to individual state philosophies which generally take a more moderate view of evaluating ability to engage in SGA, and may result in a higher incidence of allowances at initial levels.

Were federal guidelines monitored by direct-line administration, uniform application of standards would correct the inequities to claimants fostered by the present system and would nullify the present tendency to pay benefits for premature retirement or unemployment instead of true inability to work at SGA. Uniform attention to delineating residual functional capacity and relating such function to specific jobs in the economy should result in fewer reversals at the hearings level. At the same time, it would be expected that ALJs would render decisions within the law and regulations.

With the advent of the SSI program, state interest in disability decision-making has sharpened, since a DDS allowance of an SSI disability claim often means state general assistance funds are thereby conserved. Conversely, when DDS denial rates are high in the SSI program, higher levels of state administration may call on the DDS to confer about this situation which they feel is responsible for a drain on state resources.

The increasing independence of the disability offices in the states has raised serious questions of program stability and claimant equity. For example, BDI issued DIL II-59 giving directions for the third and on-going phase of a concerted administrative effort to relieve cases involving potential allowances being unnecessarily delayed at the hearings level. Phase two had operated with no serious problems for several months. Although the action had escaped the attention of CSAVR, the DIL did not, and the Council requested a DVR order for state DDSs to cease and desist their activities in these claims. Not all DVR directors acquiesed. But some did. And for a time we had a situation where some states were processing remand cases while some were refusing to implement DIL II-59. The implication for involvement of legal services in bringing class action suits on behalf of claimants who are denied services because of arbitrary state interference in the federal disability system is apparent. This problem was resolved—and the program direction has now been implemented by all the states—this time. The lesson, however, should not be ignored.

State administration does not advantage the claimant. It provides only complicated, confusing procedures when simplification is desirable; it wastes time when expeditious action is needed; and it drains off millions of Social Security and general tax dollars for the support of levels of state administration above the DDS, and other state agencies which are unnecessary for and unrelated to the disbility process.

The DDSs are totally federally funded, and exist solely to function in the federal DI system. If overall program improvement is to be achieved, their capacity for service in the system should be maximized for the benefit of the claimants and the program by shifting them into direct-line federal administration under BDI.

Mr. Chairman, this concludes my statement.

Thank you.

Mr. Burke. Thank you.

Mr. Gaughan?

STATEMENT OF JOSEPH A. GAUGHAN

Mr. Gaughan. I am Joseph A. Gaughan, assistant director of the Bureau of Disability, State of Pennsylvania, since its inception in 1955. I do not share Mr. Brown's or Mrs. Clark's views on federalization. I don't think federalization will result in any more clear or more timely directives than we are getting now. We do have the hearing problem and I feel it is urgent to resolve it but it is also urgent to see that the pileup doesn't occur there. I am talking about better decisions at the initial and reconsideration level. I have been in this program since 1955. I have been under many pressures and sometimes the pressures result from Federal laws, sometimes it results due to economic conditions. But in times of stress, to get the job done and get the volume of the disability decisions out, quality does suffer.

I am in favor of the reconsideration and remand process being continued by the States and if we had the time factor or pressure removed, I think the quality can improve.

Claims reaching the hearing levels usually are those that do not meet or equal the severity of the medical criteria, but rather those that have some impairment and the State agency feels could perform substantial gainful activity. In this area we are dealing with the criteria that is vague, subjectivity can enter the picture, and as long as this criteria is as vague as it is regarding the severity—not the severity or equal severity factor, we would always have subjectivity.

At the hearing level we are asked many times to duplicate expensive medical examinations that were already in the files when it reached the hearing level. I think it is very time consuming, it is making demands on the medical community and we are getting into an issue where I feel there should be more vocational experts up at that level rather than medical consultants.

Regarding interview by the applicant, here again we are dealing with manpower, time, and money. I don't think we should have an extensive interview at the initial level because a significant number of claims are resolved at the initial level.

However, when we do get into a reconsideration case I feel then we should have a better interview than that taken at the initial stage.

I think the State agency is the best one qualified to do it from the standpoint of knowing what the medical issues are and what information we are looking for.

In sustaining Mrs. Clark and Mr. Brown regarding their comments relating to the Privacy Act of 1974, we have had a period of 2 days to implement it and it is going to require changing about 98 different form letters and informing of physicians and things and when we write to the applicant we are advised to send him this document. I read it over and I thought if I was an applicant and see one of those I better go see an attorney.

Now the issue here is going to be delay, delay, delay, because of the fact of restrictions imposed by the Privacy Act. The State can do the job provided they are given the time and given lead time to implement what we are supposed to do.

Thank you.

[The prepared statement follows:]

STATEMENT OF JOSEPH A. GAUGHAN, ASSISTANT DIRECTOR, PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION, DISABILITY DETERMINATION DIVISION

Mr. Chairman, I appreciate the opportunity to appear before the Subcommittee to discuss the appeals process. First, I wish to state that my appearance here is not at my request but rather at the request of the committee.

It is necessary to discuss the entire disability process in order to discuss the Hearing and Appeal process. The State Agency's ability to produce quantity decisions with quality is dependent upon the resources made available to the State Agency by the Bureau of Disability Insurance. The Federal budgetary process requires as much as eighteen (18) months prior to the fiscal year in which money and manpower is made available to the State Agency. Many times when the fiscal year begins the workload requirements are increased due to either Federal legislation and/or economic conditions. State Agency requires lead time to recruit and train staff, acquire equipment and space necessary to get the job done. During this time interval, the resources available must be used to process this increased workload. Therefore, production requirements place a strain on the quality of the disability decision. Given more time quality of the disability decision should improve but the quantity of decisions per adjudicator would decrease. Under these periods of strain about 96% of applicants received an expeditious disability decision and appeared satisfied with the decision as about 4% filed for a hearing.

I feel that the reconsideration and remand cases should continue to be processed by the State Agency even though the State Agency would be handling the application 2 or 3 times.

The money available for consultative examination limits the extent to which the State Agency will purchase consulative examinations. The adjudicator would like to confirm medical reports from existing sources which in many cases lack the objective findings to substantiate the subjective opinions in the report. While there has been a reduction in the purchase rate of consultative examinations as a result of our efforts to get medical evidence from existing sources, there still remains the need for consultative examinations. The State Agency has been placed in the position of requesting physicians to provide the State Agency with evidence of record on SSDI claims without payment of a fee and the next day informing the same physician we will pay if requested by the physician for evidence of record on SSI claims.

The number of persons applying for a hearing may be influenced by pressure from welfare agencies to appeal the decision and legal council in the community legal services. I also believe some reversals at the hearing level may be due to the result of coaching to the applicant by their legal council. I have publicly heard counsel from community legal services give a presentation of how to win at the hearing level. The method was not the reasonableness of the appeal but rather coaching and harrassment of the ALJ and sources that provide evidence in file and those appearing at the hearing.

The reversal rate of about 50% at the hearing level appears to be unwarranted from the point of time it took the applicant to get a decision on his initial claim. I would prefer not to call it a reversal due to the administrative procedure act. Reversals are not made on the completed file at the time the reconsideration decision was made by the State Agency. Additional evidence was secured at the hearing level and a period of up to nine (9) months has elapsed since the time of the State Agency reconsideration decision. Many of the ALJ's requests for consultative examinations are repetitious of the same body system examinations done by the State Agency at the initial and/or reconsideration level. It appears to me that in many cases the ALJ's are looking for a medical report or testimony from a medical consultant at the hearing with a statement from the physician that the individual is disabled. Leo Price, M.D. with extensive experience in administrative and occupational medicine, has written extensively about disability programs in this country and Europe has stated, "Experience and public demand have influenced a trend toward broadening the scope of invalidity or disability definitions to cover occupational and unemployment problems created by industrial technological progress and decreasing employment opportunities for older and handicapped persons." Proper evaluation of disability claims requires assimilation of complex medical and occupational data. He then proceeds to make a point that has long been recognized in rehabilitation, "Few doctors have full competence in judging the many different aspects of occupational disability as distinguished from clear-cut biologic disability."

Claims reaching the hearing level usually are not those that meet or equal the severity, but rather those that have some impairment and the State Agency felt could perform SGA. We are dealing here with a criteria that is vague and subjectivity enters the picture. As long as the existing criteria is used, the factor of subjectivity is always present. I personally feel that vocational specialists should be used to a greater extent by the ALJ's and less medical development be undertaken.

More extensive completion of the SSA-401 "Medical History and Disability Report" would be of value of the State Agency. This could be done either at the SSA District Office or by the State Agency. Here at this point the money and manpower available are factors. Extensive completion of the 401 is not required on the meet or equal severity cases. The problem is to identify the cases where an extensive 401 is necessary. I believe this should be the responsibility of the State Agency as the issue cannot be decided until the medical issue has been resolved.

The Privacy Act of 1974 is an example of pressure to which a State Agency is subjected. The Act was passed in 1974. The State Agency on September 24, 1975, received an advance copy dated September 19, 1975, of SSA Disability Insurance Letter No. II-61 with instructions for implementation of the Privacy Act of 1974, effective date of implementation, September 27, 1975. In my opinion, this will require extensive and comprehensive revision of the State Agency procedure in the securing of evidence both medical and nonmedical from existing sources and through consultative examinations. If my analysis of the act and DIL procedures is correct, greater involvement of the applicant will be required. At the moment, I can invision an increase in processing time and a backlog occurring in claims pending.

This concludes my statement. I wish to thank the committee for permitting me to appear before it. I will be pleased to answer any questions the Subcommittee may have.

Mr. BURKE. Thank you.

Mr. Houben?

STATEMENT OF SIDNEY HOUBEN

Mr. HOUBEN. Mr. Chairman and members of the subcommittee, my name is Sidney Houben, director, Bureau of Disability Determinations, New York State Department of Social Services, I am pleased to have been invited to appear at this public hearing. I hope that I can contribute to improvements that may influence the entire disability process and benefit the claimants in this program. All staff in our State agency, and I am sure this is equally true in other States, are constantly aware that our function is to serve the disabled. We strive to better the system to that end.

As a frame of reference for the current status and participation of States in the appeals process, it may be useful to highlight some comparative data from New York State experience during the past three fiscal years. These are presented in detail in a table attached to my statement. They illustrate dramatic program growth and impinge upon the many other factors that affect every level of adjudication.

From fiscal year 1973, the last full year prior to SSI, to fiscal year 1975, the first full year with SSI, the actuarial workload estimates showed a percentage increase that was 41 percent below actual receipts, resulting in approved budgets and staffing that was substantially below the amounts requested Dispositions in New York in fiscal year 1975 were almost 30 percent above the estimates reaching over 323,000 claims or more than 3 times the number completed in fiscal year 1973. During this same period, States assumed additional functions, including some formerly performed by other SSA components, and succeeded in meeting shorter time-lapse pars that became increasingly important in serving the needy SSI population. This suggests that greater consideration should be given to the fiscal and administrative resources that will be needed to achieve process changes expeditiously and with optimum quality.

Time prevents me from covering all aspects of my statement. However, I would like to emphasize special interest in these areas:

First. The informal remand procedures should be continued until such time as other policies are developed, but with specified changes in the selection criteria.

Second. In order to eliminate costly administrative problems while safeguarding claimant rights, serious consideration should be given to substitution of telephone conference techniques for face-to-face interviews in reconsideration claims.

This would also add objectivity to the purposes of obtaining bona fide information and in making sound and objective decisions. The possibility should also be fully explored that this same telephonic technique could satisfy Kelly-Goldberg requirements in due process cessation interviews where the claimant is willing.

Third. The 90-day limit proposed in H.R. 8018 for State agencies may be achievable in only 85 to 90 percent of the reconsideration claims if face-to-face interviews are included.

Fourth. The specific hearing request contemplated in H.R. 8018 may be a burden to claimants unless an advocate is provided to assist.

I believe Congressman Pepper made comments along these same lines this morning.

Fifth. Clarification is needed as to whether H.R. 8018 anticipates a closed record as the basis for the ALJ hearing after the State has more fully documented the claim for reconsideration based on a longer time frame and mandatory interview with the claimant.

Finally, sixth, recognition should be given to the dilemma that SSI requires even more expeditious processing than title II, while it takes longer to fully document those claims due to the absence of medical evidence of record.

Gentlemen, I will be happy to respond to any questions.

Mr. BURKE. Thank you.

[The prepared statement follows:]

STATEMENT OF SIDNEY HOUBEN, DIRECTOR, BUREAU OF DISABILITY DETERMINATIONS, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

Mr. Chairman and members of the subcommittee, I am pleased to have been invited to appear at this public hearing on the Social Security Appeals Process. I hope that I can contribute to improvements that may influence the entire disability process and benefit the claimants in this program. All staff in our State Agency, and I am sure this is equally true in other States, are constantly aware that our function is to serve the disabled. We strive to improve the system to that end.

As a frame of reference for the current status of State Agency participation in the appeals process, it may be useful to highlight some comparative data from New York State experience during the past three (3) fiscal years, which are presented in detail in the Table attached to this statement. These are illustrative of dramatic program growth and impinge upon the many other factors that affect every level of adjudication.

From Fiscal Year 1973 (the last full year prior to SSI) to fiscal year 1975 (the first full year with SSI) the actuarial workload estimates showed a percentage increase that was 41 percent below actual receipts, resulting in approved budgets and staffing that was substantially below the amounts requested. Disposition in fiscal year 1975 were almost 30 percent above the estimates reaching over 323,000 claims or more than three times the number completed in fiscal year 1973. In addition, during this same period States assumed additional functions, including some formerly performed by other SSA components, and succeeded in meeting shorter time lapse pars that became increasingly important in serving the needy SSI population. This suggests that greater consideration should be given to the fiscal and administrative resources that will be needed to achieve process changes expeditiously and with optimum quality.

For the balance of my statement, I should like to refer to the specific items where State Agency Administrator reaction is sought in the Background Material on Social Security Hearings and Appeals that was prepared by the staff of the Subcommittee and released in Committee Print dated September 17, 1975.

1. REMAND TO STATE AGENCY

Although initial experience has been minimal in terms of the number of cases remanded for additional State Agency action, we have experienced 23 percent reversal rates thus far (21 Title II and Title XVI cases reversed out of a total of 91 reviewed). Accordingly, we believe it would be useful from the viewpoint of reducing backlog, shortening the time for decision to the claimant in a substantial number of cases, and from the viewpoint of economy to continue this scheme until such time as other policies may be developed to improve the entire process. In this connection, we suspect that a shortened appeal period in Title II would reduce the effectiveness of the remand procedure because the vast majority of reversals thus far have been in cases where the claimant alleged deterioration of condition.

I should like to suggest that additional criteria might be utilized in selecting remand cases, which are currently limited to deterioration of condition, allegations that the duration requirements are met, or that a documentation deficiency exists. It should be noted that no cases in the latter group have as yet been remanded.

The following groups of cases may also profit from remand:

a. Childhood Title XVI Claims.—In view of the fact the SSA has drafted listings of impairments for these claims, which I understood are now in a clearance stage and will shortly be published in the Federal Register, a review based on those standards may be pertinent.

b. Title II and Title XVI Claims for which the BHA requests additional development.—Currently, these requests are made without sending the full file to the State agency and only obvious reversals based solely on the additional medical evidence secured may result in State action to request the full file. However, an evaluaiton of the new evidence along with the entire file in every development situation may result in more reversals by the State agency.

c. Title II and Title XVI cases where the claimant identifies additional medical sources not previously mentioned in the case file.—Currently, cases remanded to the State agency more than 60 days after the date of the hearing request may be reversed only on the record and without any further development. Through September 10, 1975, of the 277 cases remanded to us, 39 (14.1 percent) fell into this category. Yet, not a single such case was reversible on the record. It is possible that the BHA may later request development on these cases due to such allegations as deterioration of condition. We believe that all cases that meet the criteria for remand should be developed by the State agency, where appropriate, regardless of the period that has elapsed since hearing application. If these time limitaitons must prevail, our experience suggests it is wasteful to remand those cases.

2. DUE PROCESS CONFERENCES PER "KELLY V. GOLDBERG" REQUIREMENT

New York State is not included in the Social Security Administration project to test the feasibility of State agencies conducting "due process" conferences to meet the Kelly v. Goldberg requirement. Based on our limited experience in the State Agency Reconsideration Interview Study (SARIS) in 1971, I believe it is possible to train necessary staff to perform the due process interview. However, the economic and administrative ramifications of such a requirement are widespread. The major problems would be travel costs for the "decision maker" and the scheduling of interviews to accommodate both the claimant and the interviewer. We assume that the "decision maker" would have to be an examiner and that a physician would not have to be included. It would be impossible to provide participation by medical staff of our Bureau.

There may be alternatives deserving of exploration as to the possibility that they may meet the Kelly-Goldberg requirement. We wonder, for example, whether the "conference" could take place on the telephone to the extent that the claimant would subscribe to such a discussion in lieu of a face-to-face contact. If this would not fulfill the due process right, we wonder whether the interviewer must necessarily be the same individual who signs the determination and develops the record. If an elite corps at no less than the same level as the examiner could be utilized, the administrative problems would be reduced.

3. FACE-TO-FACE CONTACT ON RECONSIDERATION

Our Bureau limited the SARIS experiment referred to in item 2 above to the Metropolitan New York City area in order to avoid extensive travel. At the conclusion of that study, we extended the technique to accommodate claimants throughout the State and to include all types of situations. In other words, we did not exclude psychiatric conditions or other possible problem interviews. This was done by telephone interviews in reconsideration claims, which we called SARTIS.

Although this experiment was not conducted continually due to workload demands, during the 9 week period ending June 25, 1975 we achieved a 36.5 percent reversal rate (869 of the 2,380 cases disposed). During this period, at least one telephone interview with the claimant was required if a denial was indicated. In some instances, two such interviews were conducted, the first early in the process designed to elicit additional information and the second before the denial was affirmed. I believe this procedure is essentially the same as is currently followed in the 16-State "face-to-face experiment". If the study results compare with our limited SARTIS test, it might be useful to explore the telephone interview technique in a broader experiment. Many of the administrative difficulties in face-to-face interviews could be eliminated if substantially the same results could be achieved by the telephone method.

Our discussion of the "due process" conference in item 2 above questions whether such interviews need necessarily be conducted by the examiner who signs the decision. With respect to reconsideration interviews, there need not be such a "requirement". In other words, if face-to-face interviews are the most desirable, they could be conducted by an elite corps of field-based or traveling examiners.

This would eliminate the need for the more costly decentralization of all State agencies. As a matter of fact, decentralization would not eliminate the need for field or traveling examiners since all areas of the State could not possibly be covered by this means.

4. RECONSIDERATION REQUIRED IN 90 DAYS

H.R. 8018 makes provision for a 90 day limit on State agency completion of a Title II reconsideration decision. This timing appears to be realistic in terms of current policy and standards and might also be possible to achieve if telephone interviews with the claimant were to be required. However, additional time would be needed if the face-to-face interview contemplated in this legislation is to be included. The administrative complications discussed earlier in this paper suggest that a minimum of 120 days would be needed in 10–15 percent of the cases.

5. HEARINGS

H.R. 8018 provides the claimant with only 30 days to file for a hearing in Title II claims. In addition, the claimant must "... set forth specific allegations of error of fact or law related to specific items in the statement of the case ...". From our experience in eliciting basic information from claimants concerning impairments, we believe it would be difficult for most of them to set forth the kinds of specifics required in the hearing appeal, without the assistance of a representative who is well versed in the program. The principle of specifying the issues is valid providing it does not become a burden to the claimant in pursuing his rights.

In this connection, it is not clear whether the language in this bill intends that the ALJ should conduct the hearing based on the record established by the State agency on reconsideration or whether additional development would still be possible. In other words, would the ALJ still be authorized to remand cases to the State agency to obtain additional evidence? We would hope that the additional documentation made possible by a longer time frame and the mandatory interview with the claimant at reconsideration could eliminate the development of additional evidence at the hearing level.

6. TITLE XVI TIME LIMITS

We note that H.R. 8018 and H.R. 5276 both pertain to Title II claims only and wonder what might be contemplated with respect to Title XVI claims. Although we recognize the needy component in SSI claims may require even more expeditious processing than a Social Security claim, experience shows that these claims take longer to fully document because there are fewer sources of record available.

To be consistent with the aims for better documentation at lower levels, we believe an additional 30 days would be desirable at the reconsideration level to cope with this problem.

All other comments with respect to the foregoing Bills would be applicable in terms of any revised legislation for Title XVI.

I would be happy to respond to any questions the Sub-Committee may have.

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, BUREAU OF DISABILITY DETERMINATIONS—WORKLOAD, STAFFING, AND BUDGET DATA, FISCAL YEARS 1973–75

Item	1973 number or amount	1974		1975			Increases from 1973 to 1975
		Number or amount	Percent of prior year	Number or amount	Percent of prior year	Percent Percent of 1973	
1. BDI workload estimate	111,700	161,700	144.8	248,600	153.7	222.6	[1] 136,900
2. Total receipts	106,196	208,862	196.7	298,618	143.0	281.2	[1] 192,422
(a) Title II and BL	106,196	117,002	110.2	144,235	123.3	135.8	38,039
(b) Title XVI		91,860		154,383	168.1		154,383
3. Total dispositions	104,745	169,267	161.6	323,560	191.2	308.9	218,815
(a) Title II and BL	104,745	108,696	103.8	154.102	141.8	147.1	49,357
(b) Title XVI		60,571		169,458	279.8		169,458
4. Pending end of year	13,915	53,510	384.5	28,568	53.4	205.3	14,653
(a) Title II and BL	13,915	22,221	159.7	12,354	55.6	88.8	−1,561
(b) Title XVI		31,289		16,214	51.8		16,214
5. Staff—end of fiscal year	532	939	176.5	1,004	106.9	188.7	472
(a) Professional	252	481	190.9	461	95.8	182.9	209
(b) Clerical	243	421	173.2	500	118.8	205.8	257
(c) Medical (PT)	37	37	100.0	43	116.2	116.2	6
6. Budget request	$9,036,153	$18,880,840	208.9	$26,178,800	138.7	289.7	$17,142,647
7. Approved budget	$8,552,567	$16,012,151	187.2	$20,754,758	129.6	242.7	$12,202,191
8. Expenditures	$8,126,675	$14,541,988	178.9	$20,761,771	142.8	255.5	$12,635,096

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[1] 41 percent.

Mr. BURKE. Next is Mr. Marett.

STATEMENT OF B. J. MARETT

Mr. MARETT. Mr. Chairman, I am B. J. Marett, director of the Vocational Rehabilitation Department of South Carolina. I have been with the program since the passage of the disability law in 1954. With your permission I would like to deviate from my summary because it is in my power and make a very short statement.

I have seen many studies and many task force reports the past year and a half that have dealt with disability programs and I have been proud to notice in all these reports that one of the components of the disability program has received, very, very little criticism and I have been proud to say that I am a part of the State agency that is a member of this team and I just would like to go on record and close my remarks by saying that I definitely would be against federalization after hearing all the criticisms that have been leveled at our Federal components today.

Thank you, sir.

[The prepared statement follows:]

STATEMENT OF B. J. MARETT, DIRECTOR, SOUTH CAROLINA REHABILITATION DEPARTMENT, DISABILITY DETERMINATION SERVICES, COLUMBIA, S.C.

Mr. Chairman, as State Agency officials, we are deeply appreciative of the opportunity to present our statements in regard to the appeals process. In this paper I plan to discuss the following isues: Informal Remand Procedure in South Carolina, Causes for the Hearing Backlog, Selectivity and Quality of Medical Documentation, and Comments on Proposed H.R. 8018.

INFORMAL REMAND PROCEDURE IN SOUTH CAROLINA

On August 7, 1975, the South Carolina State Agency went into the informal remand procedure and has continued this process to the present date. This report is based on our experience from the procedures' implementation to September 26, 1975 (seven weeks).

As of September 26, we have received a total of one hundred and ninety-seven (197) informal remand cases from Social Security District Offices.

Of these cases thirty (30), or 15.2 percent were returned to District Offices because proper procedures in handling or transmitting them were not followed.

Ninety-four (94) cases (or 47.7 percent) were reviewed in-depth by the State Agency and forwarded to the Bureau of Hearings and Appeals with no development beyond that done by the State Agency at the reconsideration level.

No cases have been reversed on the same evidence used by the State Agency at the reconsideration level.

Seventy-three (73) cases (or 37 percent) have been, or are in the State Agency for further development. Of these, nineteen (19) cases (9.6 percent) were developed and subsequently forwarded to the Bureau of Hearings and Appeals with no change in the decision. Two (2) cases were allowed after further development, and fifty-two (52) cases are presently under development by the State Agency.

We think it is significant to note specific reasons why cases have been developed by the State Agency. One *cannot* assume that all of these cases were improperly developed by the State Agency on the reconsideration level, by the very nature of the remand categories. Out of five reasons for further documentation, four are beyond State Agency control at the reconsideration level: New allegations by the claimant, new evidence presented at the hearing request, alleged worsening of condition at the hearing level, and lapse of time making it possible for duration requirements (12 months) to be met. In South Carolina fifty-eight (58) claims have been developed as informal remand cases for the above reasons. Fifteen (15) cases were inadequately documented at the reconsideration level, in our judgment. Sixty-four (64) percent of the cases which have required additional development have been the result of newly alleged impairments or alleged worsening of condition. Specific questions about these allegations, which are furnished to District Offices, are phrased in such a way as to make a positive response by the claimant very probable. For example, a claimant is asked, "Has there been any deterioration in your condition since our last medical vocational contact with you?" Any claimant who has been twice denied is very likely to realize that his claim might be strengthened by a positive responsive to this question.

The median time elapsing from reconsideration denial to informal remand receipt in the State Agency is 43 days. This time period seems relatively short. As stated above, 47.7 percent of informal remand cases have been sent to BHA without further development and without adding significant documentation or adjudication. This in-depth review of a case for the third time by the State Agency does require extra man hours for which we are not budgeted. In states such as ours, where we are over-realizing projected workloads, we do feel that this procedure will, in the long run, adversely affect adjudication of the regular caseload. We are most anxious to be assured that processing the informal remand caseload is time well spent. From an overall viewpoint, our experience to date has not shown this to be a constructive effort.

CAUSES FOR HEARING BACKLOG

We are all well aware of the volume of Black Lung cases and the implementation of the SSI program, which without question has increased the number of appeals in the nation. In our judgement, one of the most significant causes for an increase in hearings in South Carolina has been the publicity given to the number of appeals which are reversed at the hearing level, and the interest of the legal profession in representing social security disability claimants. For the record, we want to state emphatically that we believe in the right of appeal, and in our present system of government by all three branches, executive, legislative, and judicial. We have no statistics regarding the rate of reversal at the hearing level in South Carolina, but we are told that during the Fiscal Year 1974–75, 2345 hearings were received by Administrative Law Judges in South Carolina. We received officially only eight-one (81) copies of reversals. Without having the benefit of seeing the entire case folder, one must draw the conclusion from reviewing these reversals that the same criterion for judging the legal definition of disability is not being uniformly applied at all levels. It is not unusual to see a reversal on the evidence of record for which the rationale given is the credibility and demeanor of the claimant, or the opinion of the attending physician during testimony. State Agencies specifically avoid soliciting a physician's opinion as to whether or not a claimant meets the disability standards of the law, but seek objective evidence on which an independent decision can be reached, as to the level of severity. We believe this was the intent of Congress in establishing the disability law, since there are as many different opinions of what constitutes disability, as there are physicians.

The 1967 amendments, which were passed in an attempt to more clearly define the level of severity required for disability, specified that an impairment must be demonstrable by medically acceptable clinical and laboratory diagnostic techniques. We have noted, for example, reversals on the basis of alleged pain without objective documentation of the cause of such pain, as outlined in the amendments and regulations. Another example we have noted is that in the field of psychiatric impairments, reversal decisions are written without sufficient psychiatric documentation of severity. From all indications, we can say that the Administrative Law Judge uses lay evidence, opinion, and claimant appearance to a greater extent that the State Agency in allowing disability claims.

Until we have a criterion uniformly applied at all levels, we will continue to have a backlog of hearing requests. In our judgement, there is no way that we can have more than fifty (50) percent reversal rate of State Agency decisions by Administrative Law Judges and attribute most of this percentage to duration factors and lack of documentation by the State Agency. Unquestionably, there is not a uniform application of the law and regulations. Since January 1, 1975, BDI's review of our state's reconsideration cases has shown consistently that approximately ninety (90) percent are adjudicated and developed correctly, without substantive errors. If these statistics have any credence, the obvious conclusion is that something is inconsistent at some level of adjudication

SELECTIVITY AND QUALITY OF MEDICAL DOCUMENTATION

For several years State Agencies have been involved in simultaneous development, which promotes the selectivity of medical development. This has been done in part to prevent overloading the medical community with requests which are directed to physicians. As a result, the attending physician's report has been solicited and extensively used in State Agency documentation and adjudication. We subscribe to the philosophy that the attending physician, provided he secures adequate clinical data, is in a better position to give reliable information concerning his patient's residual functional capacity, than is produced by a onetime examination by a specialist. It is clearly demonstrated, we think, that the BHA Development Center in our region has not used selectivity in their requests. This approach has created problems in our medical relations program which have materially affected our ability to secure medical information, and placed the State Agency in a compromising position when attempting to secure information which we know is not selective. Our first responsibility and dedication from the State agency standpoint must be to obtain necessary medical information as expeditiously as possible, to allow as many claimants as possible on the initial and reconsideration levels, and to render sound decisions to the thousands of claimants whose cases never reach the hearing level. Unfortunately it continues to be more difficult to secure this information on initial and reconsideration requests, because of some requests made by the BHA Development Center and Administrative Law Judges. If the State Agency should adopt the present policies of securing medical evidence which are demonstrated by the BHA Development Centers and Administrative Law Judges, and apply that philosophy to the entire State Agency workload, the impact on the medical community would be so tremendous that utter chaos would result.

The feeling that documentation and developmental standards are not controlled on the appeals level is one *widely* held by State Agency personnel and it would be less than honest to represent the situation any differently to you. The mere fact that there is a difference of opinion on the issue of disability and application of regulations between State Agencies and Administrative Law Judges shows a very definite need for some means of assuring that the adjudicative criterion are applied uniformly at all levels of adjudication.

COMMENTS ON PROPOSED H.R. 8018

We view this bill as having a potentialy positive effect on the appeals process. The shortening of the appeals period for Title II claims brings the two programs (Title II and Title XVI) together and would be a welcome change. We have long felt that there is no need for an applicant to wait six months to file an appeal. Thirty days appears to be ample time for an appeal to be filed, and waiting as long as six months always injects the possibility that the passage of time will mean a worsening of the original condition. We see the open record concept within the Social Security appeals process as probably necessary, but it does create built-in obstacles to program uniformity. Assessment of disability is a continuing evaluation of a claimant's current physical condition, which is always subject to possible change. The shortening of the appeals period to thirty days appears to be an attempt to insure that hearings will be conducted on the record rather than waiting a year or longer and then developing current information which may show worsening of the condition.

The inclusion of the denial interview is, in our judgment, an excellent move to improve the quality of adjudication. We have never felt it was fair to deny people without giving them a meaningful reason for our actions. The disability denial procedure has developed into a very superficial means of attempting to communicate with the claimant. Often times the initial claim, the reconsideration request and all of the medical development may be taken and/or secured by telephone. The claimant is totally unaware of the process. When he received an unsigned, vague and impersonal denial letter, there is no wonder that he feels helpless and seeks any avenue of relief open to him. He would probably be able to assist in the developing of his claim prior to an appeals before an Administrative Law Judge if he were more knowledgeable and had an understanding of what is involved in the claims process. The trend has been away from an individual and in-depth rationalization to an impersonal, mass production of denial notices. This has had a detrimental effect on the integrity of the disability program. A claimant deserves the opportunity to meet face-to-face with a decision maker and be informed as to how the disability criterion applies to him as an individual, without waiting a period of several months. Although the disability program incorporates an awesome government structure, this is no excuse for allowing it to become unresponsive to individual claimant needs. An individual's physical or mental condition is of utmost personal importance to him and if denied benefits, he deserves more than a stock denial paragraph.

The proposed H.R. 8018 should help to alleviate this situation. Also, it would help the claimant take an active role in pursuing his disability claim, requiring him to be specific in allegations of error of fact or law. This provision should serve to sharpen and identify the issues at the appeals level, and this procedure does not deviate from normal legal procedure, as we understand it. If the claimant has truly been afforded a personalized rationale of his denial to which he is entitled then he should also be expected and should be more willing to assume this responsibility in the appeals process. It is our belief that a claimant's apathy is due to lack of knowledge rather than lack of concern. The fact that State Agencies will be required to individually rationalize each denial will be a *definite* asset and should improve the quality of State Agency adjudication.

Mr. BURKE. Thank you.

Mr. Sorenson?

STATEMENT OF MORRIS SORENSON

Mr. SORENSON. Mr. Chairman, I am Morris E. Sorenson, Disability Determination Services, Division of Rehabilitation, Utah State Board of Education.

I have been in this position for the past 15 years. I appreciate the opportunity to appear before this subcommittee to present some ideas from the State level on issues now under consideration.

In my written statement I commented upon proposed legislation contained in H.R. 8018 regarding the appeals procedure. From the State level we feel the measures enunciated in this bill will improve the appeals process and will have a positive effect on the operations at the State level. I would like to briefly cover three points in the following order: One, the need for a single standard of disability; two, the value of the face-to-face contact; and three, the implications of the Privacy Act of 1974.

Point No. 1: At the State level we are greatly concerned over the number and type of reversals of State agency decisions which are being made at the hearing level. We understand the reversal of a State agency decision when the duration factor is a key issue and a substantial period of time has transpired since the State agency denial for lack of duration. However, in a great number of reversals, the decision is not supported by medical evidence or nonmedical factors which lead us to believe that a far different set of standards are applied at the hearing level than are followed by the State agencies.

This is a critical problem and we would recommend to the committee that action be taken to eliminate this inconsistency and provide measures to enable the State agency and the administrative law judges to operate on the same wavelength. In this regard, we feel that disability standards should be based primarily on the objective medical criteria which have proven their validity over the years and which have been the backbone of the social security disability program.

If all levels of adjudication in the disability process follow one standard only, with emphasis on the objective medical aspect, there would be less cause for the administrative law judges to complain of underdeveloped or poorly documented cases.

The adjudicative process should result in a correct decision which either pays the applicant benefits to which he is entitled, and which will relieve, in most cases, considerable financial distress; or protect the trust fund and the tax revenues against exploitation.

Point No. 2: Utah is one of the 16 states which participates in the demonstration project wherein a face-to-face conference was held with denied claimants at the reconsideration level. We feel that this face-to-face contact provides a sounder and better documented decision. The claimant is informed of the disability severity requirements for eligibility. This personalized face-to-face interview reassures the claimant that his case has been given proper attention and that his rights under the law are being protected. We feel that if this procedure is invoked on a nationwide basis that the number of cases which go to the appellate level will be reduced simply because applicants will be better informed regarding the basic reasons why they are being denied disability benefits.

Inasmuch as the face-to-face contact at the reconsideration level has proven successful in our opinion, we would recommend that a face-to-face contact at the initial level also be carried out.

Ideally, this interview should be conducted by an experienced examiner, trained in disability evaluation. This would be an expensive procedure but in the long run would be beneficial to the program.

This initial interview would provide a more specific explanation of the definition of disability and provide more accurate and complete information regarding the claimant's alleged disability, his work record, and his medical history.

The initial interview would also provide a better explanation of available State vocational rehabilitation services and a better understanding of the social security disability program and its requirements.

Point No. 3: Implications of the Privacy Act of 1974. Although it is not mentioned in the pending legislation, there is grave concern that the implementation of the Privacy Act as far as disclosing medical evidence is concerned may seriously affect the conduct of not only the reconsideration interview but also the initial development because of the adverse effect which this legislation may have on medical sources.

Our medical staff in Utah is greatly concerned over the fact that the provisions of the Privacy Act may cause physicians to withhold completely their medical reports or limit their reports to an emasculated summary containing insufficient findings for adjudicative purposes. Such an act would have a negative effect on all levels of case processing.

This concludes my statement, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF MORRIS E. SORENSON, COORDINATOR, DISABILITY DETERMINATION SERVICES, DIVISION OF REHABILITATION SERVICES, UTAH STATE BOARD OF EDUCATION

Mr. Chairman, I appreciate the opportunity to appear before the Subcommittee to present some ideas from the State level on issues now under consideration. To improve the present hearings and appeals process, innovations and changes at all levels of adjudication are indicated.

I would like to briefly present the following points which I feel are relevant to the matter of expediting and improving the entire process of determining disability under Social Security:

1. The need for a single standard of disability and the need to redefine the role of the ALJ.
2. Mandatory reconsideration and time required.
3. Informal remand.
4. Reconsideration determination required in 90 days.
5. Value of the face-to-face contact.
6. Defining the Issue and the Hearing.
7. Implications of The Privacy Act of 1974 (Public Law 93–579).

1. *Need for Single Standard of Disability.*—At the State level we are greatly concerned over the number and type of reversals of State Agency decisions which are being made at the Hearing level. We understand the reversal of a State Agency decision when the "duration" factor is a key issue and a substantial period of time has transpired since the State Agency denial for a lack of duration. However, in a great number of reversals, the decision is not supported by medical evidence or non-medical factors which leads us to believe that a far different set of standards are applied at the Hearing level than are followed by the State Agencies.

This is a critical problem and we would recommend to the Committee that action be taken to eliminate this dual standard and provide measures to enable the State Agency and the Administrative Law Judges to operate on the same "wave length".

In this regard, we feel that disability standards should be based primarily on the objtive medical criteria which have proven their validity over the years and which have been the backbone of the Social Security Disability Program. If all levels of adjudication in the disability process follow one standard only with emphasis on the objective medical aspect, there would be less cause for the Administrative Law Judges to complain of underdeveloped or poorly documented cases.

As regards the role of the Administrative Law Judge, we recognize that the attorney is trained in the business of securing evidence and applying the rules of evidence in interpreting the meaning of the law. We think it would be fair to say that he has limited competence in rendering medical judgments. At the Hearing level the Administrative Law Judge should limit himself to a determination of whether objective evidence has been acquired, documentation has been complete, regulations have been followed and adjudication has been made according to medical listings and the appropriate application of non-medical factors.

Deficiencies in any of these areas would then result in the case being remanded back to the adjudicating agency at the State level which would then be asked to forward the results of its determination back to the Administrative Law Judge only in the event that the claim was once again denied.

We have seen examples of remarkable naivete on the part of the Administrative Law Judges in rendering their decision. We have even heard some to say in public gatherings that they could determine whether a man is disabled in a matter of minutes just by looking at him. We think there is a natural tendency for a judge given this kind of power to play the role of Robin Hood and give the king's deer to the peasants and therefore to establish himself as a hero in the eyes of the applicant.

The adjudicative process should result in a correct decision which either pays the applicant benefits to which he is entitled and which will relieve in most cases considerable financial distress, or protect the trust fund and the tax revenues against exploitation.

Objectivity must be maintained at all levels including review by the Administrative Law Judge. Again, we would like to emphasize the need for a single standard for disability adjudication at all levels.

2. *Mandatory Reconsideration and Time Required.*—The time frames for filing reconsideration under Title II and Title XVI are different. In the Title II program a denied claimant is permitted up to six months while in Title XVI only one month. We propose that both programs be uniform and that one month be the time frame. The rules of Administrative Finality would still apply for reopening of any determination within one year for any reason and within one to four years for good cause.

Utah supports the proposal of a mandatory reconsideration for two reasons:

1. It provides an opportunity for review of the previous determination by a different examiner-medical consultant team to check the correctness of the initial denial.
2. Provides an opportunity for the claimant to produce additional medical evidence and/or the State Agency to purchase a consultative examination where one was not obtained earlier.

Emphasis is placed on the fact that when an initial denial was written because of a lack of duration findings, a reconsidered case being processed two or three months hence offers an opportunity to examine the claimant's impairment at a later stage in the period of disability.

3. *Informal Remand.*—The informal remand procedure has not caused too much increase in the workload for the Utah State Agency because of the small number of cases involved. However, this procedure does refer cases back to the State Agency for "questionable" reasons. For example, an allegation of a "worsening" condition can be made all too frequently with very little objective medical evidence available to substantiate this claim. This is particularly true with cases wherein the State Agency has rendered a decision only one month previously and after obtaining a specialist consultative examination in many instances. Utah does not object to this expedient for attacking the BHA backlog; however, we feel that the procedure should not be followed indefinitely.

4. *Reconsideration Determination Required in 90 Days.*—As regards the proposal to place a time limit on the process of a request for reconsideration, we do have some reservations. Our primary concern is the fact that we would be given a statutory time limit in which to complete the reconsideration decision. We would be able to complete the decision within 90 days after the case folder has been received by the State Agency. In those cases that are delayed beyond the 90 days, we propose that a process be established which would provide benefit payments pending the final determination. This procedure would be similar to the one used in the SSI program and would provide for benefits up to three months with no attempts to recover overpayments. This should provide sufficient time for all agencies to make a final determination.

5. *Value of the Face-to-Face Contact.*—Utah is one of the 16 States which participated in the demonstration project wherein a face-to-face conference was held with denied claimants at the reconsideration level. We feel that this face-to-face contact provides a sounder and better documented decision. The claimant is informed of the disability severity requirements for eligibility. This personalized, face-to-face interview reassures the claimant that his case has been given proper attention and that his rights under the law are being protected. We feel that if this procedure is invoked on a nationwide basis that the number of cases which go to the appellate level will be reduced simply because applicants will be better informed regarding the basic reasons why they are being denied disability benefits.

Inasmuch as the face-to-face contact at the reconsideration level has proven successful, in our opinion, we would recommend that a face-to-face contact at the initial level also be carried out. This would provide for better documentation of the file and a better understanding of the Program and its requirements. As a matter of observation, we feel that a face-to-face contact at each level would reduce the number who will go to the next level of appeal. We feel that this face-to-face contact is a responsibility of the Program and one which has not been propery carried out to date.

We need to improve the process at intake by better informing and communicating with the claimant. We feel that this personalized interview at the time of the first contact with claimant would reduce the number of problems which later appear and which seemingly result from a lack of understanding on the part of the claimant.

Ideally this interview should be conducted by an experienced examiner trained in disability evaluation. This would be an expensive procedure but in the long run would be beneficial to the Program. This initial interview would provide a more specific explanation of the definition of disability and provide more accurate and complete information regarding the claimant's alleged disability, his work record and a medical history. The initial interview would also provide a better explanation of available State Vocational Rehabilitation Services and a better understanding of the Social Security Disability Program and its requirements.

Initially the face-to-face contact at the initial level would result in higher costs but better services to our disabled citizenry with fewer cases reaching the reconsideration or appellate level.

6. *Defining the Issue and the Hearing.*—It can be said that almost without exception recipients of a denial letter rarely understand the general explanation which it contains. The proposal in the pending legislation contained in H.R. 8018, Section 205(b)(5) is sound and we feel that it should be implemented. It should be understood by all concerned that implementing this procedure would require additional time on the part of the examiner to prepare a definitive explanation as well as secretarial time for typing this material. Nevertheless, we feel that this is an excellent change which will give the claimant more information as to why his claim is being denied and it may very well be a basis for reducing the overall number of requests for a hearing.

We concur with the proposed change in Section 205(b)(6) of H.R. 8018 which gives the claimant 30 days to file for a hearing. This is a reasonable and worthwhile requirement which we feel, as noted above, should also be invoked in the case of a reconsideration. This would help eliminate requests for a hearing based on such allegations as changing of an "alleged onset date" to conform to a point in time prior to date last insured.

We have some reservation regarding the provision which permits payment to a claimant while an appeal is being conducted. There may be a danger that this provision would provide certain claimants, namely those who do not cooperate, means of receiving payments while they purposely delay or fail to keep C/E appointments. Here again, the presumptive disability provisions may be the course to follow in delayed cases.

7. *Implications of The Privacy Act of 1974* (*Public Law 93–579*).—Although it is not mentioned in the pending legislation, there is grave concern that the implementation of The Privacy Act, as far as disclosing medical evidence is concerned, may seriously affect the conduct of not only the reconsideration interview but also the initial development because of the adverse effect which this legislation may have on medical sources. Our medical staff is greatly concerned over the fact that the provisions of The Privacy Act may cause physicians to withhold completely their medical reports, or limit their reports to an emasculated summary containing insufficient objective findings for adjudicative purposes. Such an action would have a negative effect on all levels of case processing,

Mr. Chairman, in conclusion we have presented several means to improve the Hearing and Appeals process. Additionally, we have alluded to the potential problem which The Privacy Act of 1974 may have on the overall program.

This concludes my statement. I would be pleased to answer any questions the Subcommittee may have.

Mr. BURKE. Thank you.

Last, we have Mr. Glen Swisher.

STATEMENT OF GLEN SWISHER

Mr. SWISHER. Mr. Chairman, members of the committee, I am Glen Swisher, director of the disability determination program for Missouri.

I have been with the program for 19 years and I consider it an honor and privilege to have the opportunity to meet with you gentlemen and discuss the needs of the program, particularly the hearings and appeals process. Since I am last on the panel, my testimony will sound very much like others, like I have been in collusion preparing testimony, but I assure you we did not discuss preparation of this testimony at any time at all and were not aware of what the others prepared.

My complete statement has been submitted for the record, so I will give a brief summary of my thoughts.

I believe a significant step to improving the appeals process could be taken by assuring the State agencies sufficient resources in both manpower and money to carry out an interview with the applicant at the reconsideration level, particularly if a denial seems indicated.

Experience through the years tells us that such an interview frequently uncovers significant evidence hitherto unknown that may result in allowance or, if a denial is appropriate, the reason for such can be explained to the applicant in an understandable, usually acceptable manner.

While I obviously cannot defend my next statement with evidence, I believe it would provide a better service to the applicant, and I believe the total cost to the program would be reduced rather than increased by this action. My reasoning is this: No more people would be allowed than are currently being allowed. Some would be allowed at earlier times but this would not result in more benefits being paid. It would prevent the cost of appeal to the hearing level. More details would be accepted because they would be understood, again reducing the number of cases appealed to the hearing level.

Services which vocational rehabilitation can provide to the applicant can be discussed with him so he can understand and make use of that service.

Decisions would be made in accordance with individual guidelines provided by BDI providing uniformity in the decisionmaking nationwide. Being decentralized, we feel we are structured to perform this task in Missouri and can be ready to begin just as soon as we can train a few more staff members to handle initial cases. This would free experienced staff to handle interviews.

I would like to conclude my statement by saying I can see no advantage whatever in federalizing the State agencies. I can see a number of disadvantages.

Thank you for this opportunity.

[The prepared statement follows:]

STATEMENT OF GLEN SWISHER, ADMINISTRATOR, DISABILITY DETERMINATION PROGRAM, STATE OF MISSOURI

Mr. Chairman, members of the committee, I'm Glen Swisher, Administrator of the Disability Determination Program for the State of Missouri.

It is indeed a privilege and an honor to be asked to appear before you to offer testimony as to how we believe the Social Security Hearings and Appeals process may be improved. I am sure that we are all primarily interested in the same basic product--that is that the right decision be made for the handicapped citizen at the earliest possible point in time and at the least expense to the Government. How to achieve this basic product is the real issue to be discussed. Experience tells us that we must not overlook one very basic, very important fact; that is that denial of an applicant without a face to face contact with that applicant and without giving him an opportunity to correct any deficiencies in the evidence may result in an incorrect decision.

Back in 1960 we engaged in a study which was actually designed to evaluate vocational factors but turned out to tell us different things. We selected cases for this study with very strict guidelines. They were all reconsideration cases; they were all cases that we felt were well documented medically and it would appear from the evidence of record that the cases were a sound denial. At that point an indepth interview was conducted with each applicant. It was found in some 40 percent of the cases that additional pertinent medical data was available that was hitherto unknown and which resulted in an allowance largely on medical grounds without significant consideration of the vocational factors. Another substantial portion of those cases were allowed on the basis of additional vocational factors which were gained in the interview. A better understanding of the skills which the individual possessed was obtained, this permitted a better evaluation of what he might be able to do with those particular skills. Last but certainly not least, the complete and total demands of his usual occupation were better understood and therefore truly considered in the final decision. This experience plus our more recent experience in the reconsideration interview process wherein applicants at the reconsideration level (which were about to be denied) were contacted; were advised they were about to be denied; were advised the basis for the decision; and were given the opportunity for a face to face discussion of the case, has proven the value of the interview. A high percentage of the applicants accepted the opportunity for the face to face discussion. These face to face discussions again brought out many salient factors that hitherto had not been documented. Additional evidence obtained included again both medical sources and medical conditions not previously covered; as well as a substantial amount of vocational factor detail that was necessary to fully understand the demands of their usual occupation. The skills they possessed could transfer to another occupation and the possible occupational families they could move toward. These experiences are adequately documented, and I am sure have already been made available to you. These experiences certainly encourage us to move toward this process for all cases.

Another major concern to most of us in the State agencies and certainly to those of us from Missouri has been the fact that the ALJ's have not been required to operate in accordance with the guidelines and procedures that we are required to follow. The lack of this requirement for the ALJ's has, in our opinion, very clearly resulted in a rather severe inconsistency in decision making. Many of the ALJ's have made decisions based more on their own experiences and on what they believe the applicant may be able to do or not be able to do rather than objective evidence considered in light of the regulations. We believe in the interest of justice to all applicants it is necessary that the same rules apply all the way through the process and that the ALJ's be constrained to operate within the same guidelines and procedures as the State agencies.

To handle disability adjudication cases properly requires very competent, skilled, and experienced staff. State agencies have developed those staffs. Adjudicators with only a few months experience can handle initial cases adequately provided that a reasonable sample of their work is reviewed. This review will not only catch mistakes but assure that the adjudicator understands the program and is indeed following the regulations and procedures.

To handle reconsideration cases and to conduct face to face interviews with the applicants at the reconsideration or continuing disability level requires a more highly skilled individual; in my opinion this skill can be acquired only through experience.

To be prepared to take over the process described in HR 8018 would require lead time and the assignment of adequate resources, that is money and manpower. If these are made available to the State agencies we can be ready to conduct reconsideration denial interviews and to carry out the other provisions that are proposed in H.R. 8018 in a relatively brief period of time. We can do this by assigning our more experienced staff to these more difficult cases and adding new staff to work on the initial cases.

The process established by H.R. 8018 is particularly appealing to us in Missouri for the following reasons:

1. We believe it is not only equitable but in the best interest of the applicant and the government to limit the time for filing for a reconsideration and to 30 days from the time of the denial letter. Should a significant change occur in the applicants condition several months after a denial letter, he always has the prerogative of filing a new application.

2. In our opinion it would be impossible to overemphasize the importance of giving the applicant the opportunity for a face to face meeting and discussion with the decision maker. This not only permits the deicsion maker to elicit additional information from the applicant but also gives the applicant an opportunity to better understand the law and regulations under which he must qualify.

3. The 90 day time limit for handling a reconsideration case is realistic. About the only situation in which more time would be required would be if the applicant experienced difficulty in keeping medical appointments for whatever reason. I would recommend that the law be amended to permit an additional 30 days of time in conditions beyond the control of either the State agency or the applicant which delays the handling of the case.

4. It is certainly most important to notify the applicant in writing of the reason for his denial. I feel it is also appropriate to help him understand the law and regulations under which his case as adjudicated.

5. We are particularly impressed with the provision that the ALJ just base his decision on the entire record and that he must reach his decision based on the record. We believe it would be appropriate to add that the ALJ must operate within the same guidelines that the State agencies operate within.

6. We also agree that the 30 days time limit for appealing the Hearing's decision is most appropriate.

According to the way the bill is written all changes will become effective the date the bill was signed. We believe it is of utmost importance for the State agencies to have 60 to 90 days lead time to make appropriate preparation to handle those far reaching amendments in the proper manner. A need for such lead time cannot be overemphasized.

The State of Missouri is well set up administratively to handle this process because we have five operating offices in the State, one for each of the five geographic areas of the State. Thus, our adjudicators, who we call counselors, can get to the applicant without traveling unrealistic distances. In fact, my counselors do get out and call on applicants and doctors at present. They are taught to do this from the time they join the agency.

I would conclude my testimony by endorsing HR 8018 and would add that due provision would need to be made for the assignment of adequate manpower and money resources to the State agencies for the administration of this bill. Let me say that I firmly believe the Social Security Administration, through the Bureau of Disability Insurance, has attempted to allocate resources, money and manpower, appropriately to the various states. There has been some imbalance resulting from the fact that some states have overrealized projected workloads and others have underrealized. Of course, these inequities can be adjusted but require a period of time to adjust. I believe our working relationship with the Bureau of Disability Insurance, both centrally in Baltimore, and in Regional Office, is such that we can resolve any problems that arise and that we can, in fact, provide the kind of service to our disabled constituents that each of us so deeply desire.

Again, thank you for the opportunity to present my views.

Mr. BURKE. Thank you.

It is usually customary to allow each panelist an opportunity to comment on the other panelist's statements. Sometimes if there is a disagreement, we learn something.

[No response.]

Mr. BURKE. Let me ask you this, is the entire administrative cost of the State agencies borne by the Federal Government? Do you submit your budgets to the Department of Health, Education, and Welfare?

[Affirmative response.]

Mr. BURKE. How are your applications for appropriations met? Are they met in a fair way or do you think you are undercut?

Mr. HOUBEN. I think——

Mr. BURKE. Do you have enough personnel to do the work in your State?

Mr. HOUBEN. I believe that the Social Security Administration has done the best they can in apportioning the moneys that are allocated to them.

Mr. MARETT. Yes.

Mr. HOUBEN. Individually speaking for New York State, we have not always received the amount of moneys we thought necessary in order to do the job, as my statement indicates.

Also, the estimates of loads on which the approved budgets are based are not always the correct estimates in terms of the actual loads received.

Consequently, there is a shortage of staff in order to do the finest quality work you would like to do.

Of course you have to balance what must be done with what you have to do it with. If you have more, you can do more. If you have less, then you can't do as well. And I think these are the things that need careful consideration.

I believe that additional funds are needed, additional resources are needed to do the job that we should be doing now and certainly to do some of the additional things that we are being called upon to do.

Mr. **Swisher.** I would like to second that and add that another important factor that enters into this is the matter of leadtime, when these things are available to us.

I recognize there are certain regulations that the Bureau of Disability Insurance doesn't have leadtime and if they don't, they can't provide leadtime to us. But there are times when we are not provided with leadtime when we should have been.

If they don't, we cannot get experienced staff overnight. It takes time and training. So the leadtime in addition to having adequate appropriations—and I would say generally we do have, but not always adequate——

Mrs. **Clark.** I would like to remark that in my opinion if the money that is appropriated to operate the disability insurance field offices could be used entirely for disability purposes as it would if we were all under a Federal system, we might not use any less money but we would be maximizing use of the money for the disability program and not for the support of all kinds of other State functions at levels of administration above the DDS's with money that comes from this disability program.

I think we should federalize and use disability funds for disability purposes under BDI not for State purposes under guidance of foreign administration—this may be VR or education, health and social services, labor or all sorts of different departments which are guiding use of this money.

Mr. **Burke.** Any other comments?

Mr. **Houben.** Mr. Chairman, I would like to comment on this comment, if I may. I don't know what happens in other States but I would like the record to be clear that all moneys allocated for the disability program by the Bureau of Disability Insurance in New York State are expended solely for our program.

Mr. **Marett.** That's correct.

Mr. **Houben.** None of it is spent for any other program. It is all for our program.

Mr. **Brown.** I would like to comment with respect to leadtime. As far as we in Tennessee are concerned, this is most critical. In 20 years I can hardly remember a time when we needed resources in terms of money or staffing that either the regional offices at Atlanta or Baltimore did not make them available to us.

We currently have a staff ceiling of 222 man-years, and are operating on less than 200. We don't try to get to the trough and get it all, we try to manage efficiently and economically and make good use of our money.

Of our budget last year, approximately $600,000 was paid to to parent agency for the administrative services. This is about 13.6 percent of our total costs that goes to assisting in administering our program.

Mr. **Marett.** Mr. Chairman, in that connection, I think what they are referring to, administrative expenses, or what we call indirect costs, as I understand it is not within the purview of the Social Security Administration.

It is agreement between States under—what is that?

Mr. HOUBEN. FMC 74–4 now.

Mr. MARETT. And as I understand it the Social Security Administration has nothing to do with that. It is a formula for indirect costs, for administrative expense for the parent agency.

Mr. BURKE. Doesn't HEW have to approve that?

Mr. MARETT. I think that's true, yes.

Mr. SWISHER. OMB, I believe, does.

Mr. MARETT. I don't know for sure.

Mr. GAUGHAN. Our activity generates costs for other State personnel, the auditors, and sometimes the Attorney General's Office.

Mr. MARETT. Plus data processing.

Mr. GAUGHAN. They call that indirect cost. We have no control over that. That is determined between the States justifying indirect costs, submitting it to Federal auditors and HEW and having it reviewed and approved.

So I agree when you say 100 percent of the money is not used for disability purposes, but it is used for the program and support functions.

Mr. BURKE. From what you have all said, you are all career people. is that right? You have all come up through the ranks over the years?

[Affirmative response.]

Mr. BURKE. You are not appointed on a year-to-year basis?

[Negative response.]

Mr. HOUBEN. We are civil service.

Mr. BURKE. One of the most important bills before us at the present time is H.R. 8018, the Sisk bill. There are a number of ways in which it would affect State agencies.

Now, if one person objects, I won't do this, but could I poll the panelists on each of the following provisions?

I will read them off. If anybody objects, we will drop the question and let it go.

One, face-to-face conference with claimant, if he requests consideration?

Two, 90-day requirement for decision by State agency on reconsideration.

Three, if State agencies still deny benefits, a notice to claimant with a summary of evidence, a citation of the law and regulations and a determination made on the issues and summary of reasons for determination would all be required of the State agency.

Mr. MARETT. I am in favor of these amendments.

Mr. SWISHER. Mr. Chairman——

Mr. BURKE. If you agree to all of them, or part of them, just say so. We are trying to get your opinions.

Mr. SWISHER. I agree to all of them with a minor modification.

There are a few cases that cannot be processed in 90 days for no one's fault. I would like a provision there. That wouldn't be the fault of the administration or the applicant. I have said this in my prepared testimony and I would like to see a provision for an extension of 30 days if certain conditions exist.

Mr. MARETT. Mr. Chairman, there come times when it is absolutely impossible to secure medical evidence, for example. I can cite you one of the biggest problems we have in our State where an individual is a veteran and is in the Veterans' Administration hospital. It is impossible as long as he stays hospitalized for us to get any objective evidence upon which to base a decision as to duration and severity.

We need some clauses in there for that.

Mr. **Burke.** Does anybody disagree with any of these three, outside of the reservations made?

Mr. **Houben.** I would also like to endorse that for 10 or 15 percent of the cases additional time, possibly 30 days additional, is needed.

In my State, I peg this primarily to the situation that we are required to have face-to-face interviews. As you know, I favor doing substantial amounts of this by telephone as we have tested doing in New York State.

Mr. **Burke.** I wanted to get back to that question. You seemed to favor the telephone approach rather than face to face.

Mr. **Houben.** Yes.

Mr. **Burke.** Is that because of costs or what?

Mr. **Houben.** I believe there are several reasons for this position. Cost is one of them.

Other administrative complications come into play. The question has been raised about face-to-face interviews, and their practicability if States were decentralized, but I don't think this is the answer. I don't think centralization versus decentralization has much to do with the ability of conducting interviews.

At the reconsideration level, I believe it would be administratively possible to have a cadre of examiners to travel a State in order to perform these interviews on timely bases.

So that it is not an insurmountable problem, but it is costly.

The two major reasons for the interview are to get additional evidence from the claimant and to interpret to the claimant what the program is about and the reason for impending denial. This can be and has been done very effectively on the telephone in New York State.

A face-to-face interview adds a certain subjectivity. As you know, we are operating with a very severe definition of disability. To see the claimant colors the opinion of an examiner as to whether this meets the test.

It is clinical data on which a decision is based. I suspect that very often the ALJ decisions reverse the State's because of some of this subjectivity. I am thinking not only of costs. I am thinking of administrative complications, and I am also thinking of objectivity in pursuing the evidence and the conclusion.

I am also thinking that if you would study telephone versus face-to-face, I believe you would find the reversal rate is not that much different.

Mr. **Gaughan.** Mr. Chairman, I would like to comment from a State that is partially decentralized. Mr. Houben's State is operating centralized operations, is that correct?

Mr. **Houben.** Yes, sir.

Mr. **Gaughan.** We have the State in three regions and the staff no more than 100 miles away from any individual that has to have an interview. The interview is made at the applicant's convenience at a location of his choosing, that is, the employment office or social security office or someplace else.

But there is a certain effect the applicant gets out of it, it is the first time he has come face-to-face with an individual who is making a decision on his case.

For most of the claimants, it is the first time he is told: He is more than a piece of paper, or a social security number. I know it doesn't make the decision any more palatable to him. But it used to be that Lester O. Webber used to make these decisions when these thousands of people got a decision. But in this situation when the denial letter goes out a week after the interview they know that the individual that spoke to them made that decision.

We have gotten nasty feedback letters when the decision was unfavorable, but I believe it does have a beneficial effect in letting the applicant come face to face with the man making his decision. I think it can be accomplished in a State agency that is decentralized and I would prefer a face-to-face contact with them rather than over the telephone.

Mr. BURKE. How do you feel this affects due process requirements?

Mr. HOUBEN. Well, I suggested in my statement also an explanation of whether this would be possible to satisfy Kelly-Goldberg requirements in situations at least where the claimant would be willing to have such an interview. I think this would reduce substantially the number of cases where the face-to-face interview would have to be set up. I am not ready to go as far but I certainly encourage exploration of—if that proves to be true—whether this could be extended to other claimants and not leave it at the claimant's option.

My reasons are the same. There is one additional complication under the Kelly-Goldberg requirement. I would certainly hope that if a face-to-face interview were necessary by the "decisionmaker," that decisionmaker would not necessarily have to be the individual who signed that decision but could be another member of the agency staff who is at least at the same level as the person who signed the decision. Again, a cadre would become experts in this kind of due process interview.

Otherwise, if we think of the volume of cases throughout the country—and I am particularly concerned in New York, which was atypical with the advent of SSI—but we did handle over 300,000 claims. Our current load is running over 200,000 claims and even thought the denials in reconsiderations are a small segment of that, or the cessations we talk about in due process are a small segment, they still represent a sizable volume, a much larger volume even than outlined a few moments ago in terms of the court decisions.

Mr. BURKE. There is another question I wanted to ask about salaries of administrative judges. I want to be careful how I put this. I don't want to have people coming back on this, but what is the average salary of the people that are in your agencies?

Mr. MARETT. Mr. Phillips should be able to answer that.

Mr. BURKE. Does anyone have any information on that?

Mr. Phillips?

Mr. PHILLIPS. Mr. Chairman, I have an experiment from my report. Apparently examiners and initial claims examiners vary from over $13,500 in Alaska to less than $8,000 in West Virginia. Reconsideration specialists get around $14,000 in Texas and less than $8,000 in Oklahoma.

The first line supervisor in paid over $15,000 in New York, and less than $9,000 in Puerto Rico.

Mr. BURKE. These salaries are set by State officials?

Mr. MARETT. The State personnel and State civil service.

Mr. BURKE. From what I can gather, there is some resentment about salaries being paid to Federal personnel sitting in on these cases, and lower salaries being paid to employees of the States. I don't know whether that is true or not.

Mr. HOUBEN. Although I would not like to suggest that salaries throughout the country should not be increased and I certainly subscribe to the fact that they are underpaid all over. I suspect that they might be underpaid even where the salaries appear large. But I think we should put this into some perspective by recognizing that all States themselves have different salary schedules, and all States have different costs of living and from the viewpoint of the national program, it is probably less costly nationally to run the program than it would be otherwise.

There is an added problem here, I think, that should be considered in this whole question, namely, the original objective that a local decision should be made, particularly in terms of the medical evidence that needs to be secured.

Personally, I think that the arrangement we now have on a statewide basis contributes to that relationship with the medical profession, and also part of that has to do with the varying fee schedules throughout the country that have to be based on local conditions.

I suspect that there would be problems with this under federalization. There may even be problems of administration if a standard fee were to be paid throughout the country for consultive examinations.

Mr. BURKE. The administrative law judge sits all over the country, and on a Federal level he gets paid the same salary whether he sits out in Wyoming or whether he sits in Alaska or Puerto Rico or any other place.

Mr. BROWN. Mr. Chairman, this salary differential is compounded with the continual transfer of previously Federal responsibility to the States. The State people that are so grossly underpaid have some pretty strong feelings and lack of understanding about this: A federally funded program administered by a State agency with work being continually transferred from Federal counterparts to the States, with no compensation for that additional work.

Mr. BURKE. That is why I raise a question. Sometimes a clerk does all the work and the head of the operation gets the credit and the salary.

Mr. BROWN. There often is no consideration by the States for this. It is kind of a laissez-faire attitude they take.

Mr. MARETT. I would disagree with that strongly.

Mrs. CLARK. I would agree with that strongly.

Mr. BURKE. It is good to get disagreements and opinions.

I have questioned enough.

Mr. Pickle?

Mr. PICKLE. Mr. Chairman, first, do we have any other witnesses this afternoon?

Mr. BURKE. Yes.

Mr. PICKLE. We have another panel after this?

Mr. BURKE. We have four witnesses—single witnesses.

Mr. **Pickle.** Let me ask you, are the directives which come from the social security offices, regional or national, are they clear and concise, or is there confusion on the kind of Federal instruction that you get?

Mr. **Brown.** The most recent one is a very good example of a very confused one. I have not been through it. Some of the staff have, and it is most difficult to decipher.

Interestingly enough, we got it the same day that our regional offices in Atlanta got it. They had no more advance notice than we did, and the next day we had to implement it.

Mr. **Gaughan.** Needless to say, some of us have not implemented it yet.

Mr. **Pickle.** Have you understood it yet?

Mr. **Gaughan.** No, sir.

Mr. **Pickle.** Is this average or normal?

Mrs. **Clark.** Over the years, the instructions from BDI have been very good until the advent of the SSI program. When we got SSI instructions, there was confusion in the whole system due to a number of reasons and this was reflected in the instructions.

Mr. **Pickle.** I am primarily talking about the advent of the SSI.

Mrs. **Clark.** All right. I think that lately we have noticed a strong effort by BDI to upgrade the DISM, to clarify instructions and to bring order, clarity, and ease of reference into the manual.

Mr. **Steiger.** Hold on a minute, Jake. You talk about confusion. What is the "DISM"?

Mrs. **Clark.** It is the Disability Insurance State Manual.

Mr. **Steiger.** All right. There also is a BDI, which I assume is the Bureau of Disability Insurance, and there is DIL. What is the DIL?

Mr. **Sorenson.** Disability Insurance Letter.

Mr. **Gaughan.** They put it out in letter form until they get the printing completed.

Mr. **Steiger.** I appreciate that clarification. That is DIL?

Mr. **Pickle.** I thought that was a pickle. [Laughter.]

Mr. **Steiger.** Did I ever open myself up for that one.

Mr. **Pickle.** Then the instructions have quite often been confusing since the advent of the SSI, and this has caused part of your problem.

Is it a serious confusion, or you have any suggestion about how it can be corrected? I'm talking now about instructions and directives.

Mr. **Houben.** It has been a very distressing period since the advent of the SSI for everyone, because we have been developing new policies. The fact that there was a year period of grace in order to implement the program was not enough for so mammoth a job, and we have had the same problems in New York that these other States have had in terms of confusion in instructions, and so forth. I don't think it is anyone's particular fault other than the fact of the way we were faced with it. No matter who administered this program, you would have had the same kind of problems, and I think BDI did as well as possible.

Mr. **Pickle.** That is what the person from South Carolina has said.

We have got a tremendous jam. The issue now is not so much whether you have done the best you could, but how we are going to come out from under this thing. That is what we have to face now.

I want to ask you a general question. I don't know whether you can answer it, but if you look at the chart here on disability determination, we have five steps here.

If, and as I recall it—and I am sorry, Mr. Chairman, I missed some of these hearings today, but I couldn't help it, and I may be a little fuzzy here—but in the first step, you can go to State agencies and district offices.

Now, next is the reconsideration by State agencies.

As I recall it, that was made mandatory in about 1959, or thereabouts, and then we go from there to administrative law judges, appeals courts, and then the U.S. court decision.

Now, it has to follow that when you have five steps, you are going to have lengthy delays.

Is there any way that we can cut out one of these steps? Can we combine them? Was it a good thing when we made step No. 2, the reconsideration by State agencies, mandatory? Could we make that back up in step 1? Could you have your face-to-face there? Is there any way to save one of these steps?

Mr. SWISHER. I think it could be done, but it would be costly in terms of dollars and manpower.

Some people suggest removing and putting the reconsideration steps up there, but if you do that, we will be really overloaded.

It seems to me right now we are addressing ourselves most vigorously to improving the reconsideration process, and as a State administrator, it seems to me that is where we are going. We can improve our initial process, too, all we can, but the big place that we can improve is at the face-to-face interview at the reconsideration level.

Mr. PICKLE. Can you move the reconsideration up so you can get back to it quicker?

Mr. HOUBEN. I think you can cut something out. If you close the record after recon based on some of the features of the bill, where you are lengthening the period that the State has to document that claim, from 90 to 120 days to fully document the record, and then close that record and let the ALJ make his decision based on that record.

Mr. PICKLE. Within 90 days?

Mr. HOUBEN. Within 90 days. If you have specific instances where a remand is necessary, make it specific and very few.

Mr. PICKLE. In other words, another 30 days if certain conditions exist.

Mr. HOUBEN. Correct. Close the record then. That is where the delays come, between recon and hearing decision.

Mr. PICKLE. Do the rest of you agree generally with that?

Mrs. CLARK. I think that if we are going to really make some improvements in this program that are worth while we have to federalize the State agencies and use the talents and manpower available to work with the claimant from the time he files a disability claim, so that from the initial claim we have those issues clarified, and we know all the medical sources, and the claimant is assured that we have a mutual understanding of what the issues are.

As it is, the claimant doesn't see anyone until he gets to the hearings level, and even if there is a face-to-face conference at recon, we have wasted a whole step. I think we need to get together with the claimant when he makes the application, and we need more than a contact with a technician who is trained in getting the documents together, to have a valid file, such as the C–16, the social security form for application of disability benefits, the records of marriage and death and military service and all the other forms that go to make up a file.

It may be necessary to leave this technical function with the district office personnel. But I think we need to have early contact with the claimant to find out what this person's problem really is and to assist him more directly.

Mr. **Pickle**. What do you mean when you say we should federalize the State office?

Mrs. **Clark**. There is no point that I can see in leaving DDS's under the direction of vocational rehabilitation, or labor, or health, or any of the other State agencies. We exist only to serve in the Federal disability system. We receive our directions from BDI, our operating directions. Only the Federal claim load is handled. So why should DDS's be State? I think we, DDS', need to be moved into the main line of Federal administration and to have our part in the Federal system. I think we could be much more productive.

Mr. **Burke**. Mr. Marett, you do not agree with that?

Mr. **Marett**. I disagree; yes.

Mr. **Pickle**. Speak up.

Mr. **Marett**. What I spoke about a while ago, if she said that the Federal people at the district office level took the claim, and then it comes to the State agency, my comment was, sir, that on all the studies I have seen, since the advent of SSI, the State agencies have been performing in a real good manner, I think. We have done our job pretty well.

We have had a tremendous workload, surely, but we have moved out our workload, sometimes not as good as we should, naturally, because everybody has their days.

So my comment is that I am proud—I am a State agency—and with the criticism I have heard today about our counterpart in the Federal agencies, I don't want to be a part of it.

Mrs. **Clark**. I think it is just incredible that the Bureau of Disability Insurance that has responsibility for this program can't get at the field offices, which is what we are, unless they say, "May I?" to some State entity, which has no interest in the program except to provide the personnel to carry out the contract. I think BDI needs to direct field offices just as much as they do the regional offices, and to make sure the program decisions are implemented in a uniform manner across the country.

Mr. **Pickle**. I assume there is division of opinion on that subject.

Mr. **Marett**. Yes; and to carry my point one step further, sir, I don't like the word "direct," because I do not think that BDI directs people. I don't think we are in an age that people direct people to do things, because this age of ordering people around is just about a thing of the past, and when I look at the statistics concerning uniformity in the offices that BDI directs, then I question whether they are actually directing them or not.

I think possibly if you could look at the total figures that you are getting more uniformity in State agencies without them being directed by the Federal BDI operation than you are getting out of the offices that they're directing.

Mr. Houben. On this same point, I think this Federal-State relationship that was set up in the original legislation in 1954 has demonstrated over the years that it is a fairly well working system.

I suspect, also, that in this very difficult year with the advent of SSI, that had we been federalized, that we would have had far, far more problems than we now have, because there was the possibility for the States, with their independence of action, to handle much more than they may have been able to handle if they had to wait for Federal direction, and this is true on an ongoing basis.

True, there are some inequities here, and I would love to see Congress find ways to solve them.

One of them may be the possibility that the agreement could be a mandate to the States on the minimal levels of salary for all the people, because they are performing a Federal function. That might solve the other problems of salary.

I suspect that most people who want federalization are concerned about that inequity more than anything else.

Mrs. Clark. Mr. Congressman, I would disagree. Salary is a part of it, yes, and a few years ago I would have said it would be the major part of it, but not now. I think the inequities to the claimant are being compounded as the DDS responsibilities increase and the States become more interested in what we are doing, because when we allow an SSI claim, for example, it frees up the State general assistance funds.

Conversely, when we are not allowing SSI claims, it is not uncommon to have State administration become interested in how we are judging those claims, and whether we couldn't do more to get those people on the Federal rolls instead of the State rolls.

Mr. Marett. We don't have that pressure in South Carolina, sir.

Mr. Pickle. Mr. Brown, do you want to comment?

Mr. Brown. Yes. I can't picture all the solutions on that chart there, but reducing the hearings backlog by a thousand a month, and no telling how many more are filed, I don't think we have approached any drastic surgery that will help us solve the problem. It may be time to stop the appeals process before it gets to court.

Mr. Pickle. How do you do that?

Mr. Brown. The Veterans' Administration does it. They have a panel that reviews it after reconsideration, and it stops there. It is not subject to court review. They have a panel of a claims adjudicator, a physician, and an attorney. Why must we, if the Veterans' Administration can get by without it, why must we subject the claimant and our administrative procedures to this long, expensive process?

Mr. Pickle. You raise an interesting point. Why can't we do something like that? Can we?

Mr. Brown. We have to get around APA.

Mr. Houben. I am wondering whether the current moves toward equal rights and due process might have an effect on what Congress could do with that? There seems to be a tendency to allow people the right to go to the courts.

Mr. Pickle. None of us—and I can be a strong authority of one with nobody else here—but nobody can help but have a strong feeling about the due process.

There is a strong feeling in Congress, also, to simplify procedures. We have many cases pending—over a hundred thousand plus. We have to do something, and we can't sit here as a committee with primary jurisdiction over it and simply try to determine what the ideal way to go is when 100,000 people can't get their cases settled.

So if it takes drastic surgery such as that, I would be anxious to look at any other strong approach, too. I am not critical of this one, but I am unhappy about the delays, and if you have any additional thoughts along that line, I would like you to submit them to me, or I can use the Veterans' Administration as a pattern.

Mr. **Brown**. I see no reason, and there may be 50, why we can't adopt a similar procedure.

Mr. **Pickle**. I will get back, Mr. Chairman, but I have to go vote. We have a very interesting discussion going, Mr. Chairman.

Mr. **Burke**. This will conclude our questions for the panel now.

I might say to the panel that the committee and the staff have other questions to ask of you, and they will be sent to you individually. If you will be kind enough to cooperate and answer them in the best way you can, the committee will appreciate it. Those answers will go into the record.

Mr. **Brown**. Mr. Chairman, one additional comment. I think it should be noted that these will be put in the record. Some of our colleagues were caught off guard when their responses were printed, and I think a comment to that effect would be helpful.

Mr. **Burke**. These do not relate to our earlier questionnaire. These are additional questions by the members of the subcommittee and the staff. You people have expertise in your area, and you could help the subcommittee out a great deal by giving us the benefit of your response.

Mr. **Houben**. We will be happy to respond.

Mr. **Marett**. Yes.

Mr. **Burke**. They won't be rough questions, but more or less information-gathering, but just remember, they are going to be down in black and white for years to come.

So I want to thank you all for your presence here, and your cooperation.

[The additional information requested follows:]

QUESTIONS SUBMITTED TO PANEL MEMBERS

1. *Effect of SSI and remand of cases*

Has the Supplemental Security Income Program resulted in increased pressure and less time to make quality decisions? How will the remand of cases affect this situation?

2. *Remand to State agency*

What do you think of the suggestion of giving the ALJ's authority to remand cases back to the State agencies?

3. *State agency—initial interviews*

If initial interviews were handled by your adjudicators, would this result in shorter processing time? If you did this, would you have to de-centralize your operation?

4. *Additional costs of H.R. 8018*

How much in additional resources will you need to carry out HR 8018? How much lead time will be required? State whether your state is de-centralized or centralized.

5. *Speed in processing district office claims*

Has the pressure of the Social Security Administration for speed had a marked effect on the quality of the file you receive from the District Office?

For instance, just this summer, the Social Security Administration has stated that the SSI disability claim can be held no longer than seven days in the District Office, and just recently they have imposed a ten-day limit for social security cases. Will this reduce the quality of the file which is sent to the state agency?

6. *ALJ allowances*

Do your adjudicators find it hard sometimes to effectively determine entitlement to continuing disability when claimant has been allowed at the hearing level? Why is this so?

7. *Privacy Act problems*

Explain what additional steps will have to be taken under the Privacy Act in procuring medical evidence. How will this affect processing time?

8. *Hiring freeze*

Although the program is entirely financed by Federal funds, can a State hiring freeze prevent adequate and timely staffing? Have Federal hiring freezes also affected your operation in this regard?

9. *Centralization of the State agency operation*

What are the arguments for and against a central office operation as opposed to branch offices? Why don't we have uniformity in this regard?

Response of Herbert L. Brown

1. The addition of the SSI program without a waiting period prior to paying benefits as in DIB has resulted in a tremendous increase in pressure to reduce processing time. Many claimants file concurrent claims which we process simultaneously in about 30 days, on the average, including securing all evidence, making a decision, checking for quality and mailing notices on denials. Pressure? Unbelievable! With sufficient staff, remand cases cause no additional problem.

2. I doubt that they would take advantage of it. They don't like to give up the case even when the medical evidence we secure for them will support a reversal that we could make and expedite payment.

3. We have a centralized operation and could not possibly conduct a personal interview with each claimant and should not. The district office personnel should continue to do this but do it adequately and stop short-cutting the interviews.

4. Resources, i.e., federal authority for money and staff, are not necessarily the solution. We would want to utilize our present, experienced staff to do the interviewing then replace them with new hires. We have no incentives to persuade our staff to do the traveling that would be necessary. We cannot offer government cars, travel advances or promotions. If we were to consider de-centralization, we could not pay moving expenses to transfer our people to areas where they are needed. State law prohibits us using federal or state funds for such use. With appropriate incentives we would need six months.

5. The pressure for speed has had a more adverse effect on district office quality than on that of the state agency. When the D/O's "sloth off" on their work, they pass it on for us to do. The buck stops with the state agency. The seven and ten day limits aren't the problem. The problem is they don' see all the claimants and when they do they fail to get the needed information. The policy is such that if the D/O fails to get it, the state agency can. The tendency may be for neither to get it resulting in an inadequately developed claim. It's inconceivable that so much pressure can be put on the district offices and the state agencies and so little, if any, on the ALJ's.

6. Unless a beneficiary returns to work about the only way to terminate benefits is to show medical improvement. If a person is awarded benefits by an ALJ with essentially no impairment or limitation, improvement is practically impossible to establish. This frequently happens. About all you can do is continue benefits.

7. The advanced copies of instructions (DIL–61) on the Privacy Act were received September 25, 1975 with effective date September 27, 1975. On October 8, we received the first two revisions of the instructions. We are unable to determine

the effect of this Act on our agency. Right now it is creating mass confusion and delaying case processing.

8. Hiring freezes in addition to freezes on purchasing supplies and equipment, securing space, promotions, and salaries all affect our operation. Only occasionally does federal money make a difference. Federal hiring freezes have not affected us adversely.

9. Without the need for personal, face-to-face contact, I can make no case for de-centralization. We started out with 3 offices and later centralized in about 1958. Our reasons for establishing a de-centralized operation in the early years was due to anticipated frequent contacts with claimants that never materialized. That being the situation, we felt that a centralized operation provided improved management and control, reduced cost and generally provided for a more flexible operation. Social Security leaves this decision with the states.

RESPONSE OF MARIE CLARK

1. Yes. Although we have made every effort to maintain quality, the need to complete processing within a drastically reduced time frame for these claims cannot help but be reflected in the character of the decisions. Claims are given a "quick rinse" and, hopefully, most of the obvious allowances and obvious denials are identified rapidly and correctly, but claims involving more complicated issues may inadvertently be given short shrift due to pressures for reducing processing time.

So far, the remand cases have been a negligible part of the case-load and we feel no significant extra pressure in handling them. However, the remand procedure may be a sleeper which could catch fire and cause very real problems. Further investigation is being undertaken to determine whether this process is worthwhile. When the results are in, we should be able to make a better judgment on future impact.

2. If ALJs were bound by the same restrictions for adhering to the law and the regulations, and were held accountable for their decisions as the DDSs are, we would feel remanding claims to DDSs would be a good procedure in cases where (1) there is significant worsening or change in a condition, (2) new or previously unavailable medical information has been received, or (3) a new impairment has completely changed the original issue. We have long felt that ALJs' responsibility should be limited to ruling on completed determinations, and they should not assume the function of a disability adjudicator in developing evidence and making decisions when circumstances change, and an essentially new case is presented.

3. It would not be proper for state disability personnel to conduct interviews for federal disability claims information, and we would resist playing "fed" for the convenience of the government. We have strong feelings about the ethics this would involve.

If the Congress sees fit to perform the drastic surgery necessary to bring the fragmented disability programs together under the administration of the federal bureau, the disability staffs have the capability to effect many improvements in the programs. Certainly the claimants would no longer have to take it on faith alone that cadres of skilled disability personnel are assisting them in pursuing their rights. We would become visible and we would be accessible. Getting the old "transfer of jurisdiction" routine out of the way would shorten processing time in some ways although the change would not be expected to move the medical community to an abrupt improvement in their reporting habits. In that regard, we expect the problems would remain much the same as they have over the years, as when the DO's were initiating medical requests as well as since the DDSs have been initiating medical requests.

You ask whether we would need to de-centralize our operation if we handled initial interviews—we believe this would be necessary in that event.

4. This question reads as if HR 8018 were an accomplished fact, and we would certainly not support it in its present form. However, to try to be responsive to the question, we feel this amendment would increase our operating budget by 30%–50%. We would need at least 6 months' lead-in time AT THE STATE LEVEL. It is our understanding that the federal level had some 9 months' lead-in time on the Privacy Act, while the states had only a few days, or in many cases, none at all.

5. No. The quality of DO interviews has been steadily declining over the years as other responsibilities to the retirement and survivors programs, the health insurance program, and other programs has increased. The narrative background report used at the inception of the DI program has gradually evolved into a simple form which can be completed quite easily without DO assistance.

We are at a loss to understand the DO complaints about the difficulty of taking disability claims. We do sympathize with them and we believe the total DI function should be removed from their offices and placed in federal DI offices.

As for the pressure for speed at the DOs and restrictions on the number of days claims may be held after filing, we see no reason that claims should be held at all. At present the DO furnishes only the 401 (Report of Disability Interview form), the 827a (The Authorization for Release of Medical Information form), and a partially completed 831 (Disability Determination and Transmittal form). Since we no longer defer medical development until a determination as to whether the earnings requirement or income and resources requirements are met, we believe these documents should be forwarded to the DDSs the same day the claims are taken.

6. Most emphatically, YES!

Often an allowance by an ALJ is not based on the law and the regulations and benefits appear to be awarded because of a clairvoyant ability of this group to tell just by looking at a claimant that he or she is disabled, or because "In view of the conclusion of the undersigned, which is wholly favorable to the claimant, further recitation of the evidence is unnecessary." (This is a direct quote which we often see on our reversals.) It is difficult and sometimes impossible to document improvement when the condition was not disabling under the law and regulations in the first place, and has remained relatively static since the allowance.

7. DDSs have been advised that an attachment explaining that confidentiality of medical reports can no longer be guaranteed, must be furnished with each request for medical information and this practice will be continued until the end of March, 1976. This additional step will not pose any great problems. We are somewhat apprehensive about the reaction to this notice, however. The medical community is particularly sensitive to possible litigation since the heightened problems with malpractice insurance. We may experience delays and additional charges for screenng, re-writing, or excerpting information from charts. We feel hospitals and institutions whose records contain considerable incidental information regarding a patient's attitude, cooperation with treatment, etc., may not share information with us as freely as in the past. However, since we have had no actual operating experience with the Privacy Act, this is pure conjecture.

8. Yes. During the last session, our legislature placed definite restrictions on the size of the DDS staff. If we needed to add staff to accommodate an amendment to the law, there would be problems in securing authorization for additional personnel.

While Federal freezes have not affected our operation directly, we do feel the impact of these freezes on other agencies—for example, our local VA Hospital had only one clerk in the medical records department for a considerable time, and as a result, requests for evidence were backlogged.

9. DDSs have not been and are not now engaged in direct public service. Under the contracts with the Secretary we process claims files. Administratively, it is simpler, more convenient, and more economical to have this sort of operation concentrated in one spot. I am not familiar with the reasons for decentralization in some of the largest states, such as California, while other states with large populations, such as Texas, have a centralized operation.

RESPONSE OF JOSEPH A. GAUGHAN

1. From the standpoint of additional changes to the original Supplemental Security Income program, that is, the making of presumptive disability decisions, the instituting of interim assistance payments and emergency advance payments, there has been pressure placed upon the State Agency to make a disability decision as quickly as possible. As far as the remand of cases to the State Agency is concerned, our remand cases have been in the area of SSDI cases. There has not been enough of SSI remand cases to form any conclusions as to the effect of SSI remand cases. We are prepared to process SSDI remand cases

without any problem and to devote sufficient time to these cases so that a quality decision can and will be made.

2. I do not feel the ALJ's should be given authority to remand cases back to the State agencies. I feel in remanding the cases to the State Agency, the ALJ will probably indicate what type of medical development would be required and this would just shift the pressure from the ALJ to the State Agency. In my testimoney of October 3, 1975, I indicated I felt there was too much medical development requested by the ALJ's often repetitious of what the State Agency had developed at the initial and reconsideration level. I also recommended that the ALJ's use more vocational consultants in their hearings as the issues in most cases when it reaches the hearing level is not of meeting or equaling the severity but of determining what activities the applicant can engage in consistent with the degree of impairment he has. I further suggest that the ALJ's have available to them at least on a weekly basis, a board certified internist specialized in cardiology since 35% of the impairments fall into the cardio-vascular system. I also recommend that a board certified orthopedist be available for use by the ALJ since about 15% of the impairments fall into the musculo-skeletal system. I believe if these two (2) specialists were available for consultation with the ALJ from the standpoint of reviewing the medical evidence now in the file, the time consuming procedure of requesting additional consultative examinations in these areas could possibly be eliminated. I am in favor of automatic remand by the Social Security office to the State Agency of all reconsideration cases and that the State agencies complete the disability on reversals at the reconsideration level and then forward to the ALJ the remand cases in which the State Agency feels the prior adverse decision should stand.

3. I am not in favor of State Agencies doing a comprehensive interview on all initial claims. A significant number of initial claims are adjudicated on the basis of regulations 404.1502–A1 and/or A2. I feel that an initial interview by the State Agency on all cases would be a waste of manpower and time. However, after evaluating the claim and it cannot be adjudicated under the above criteria and vocational factors have to be developed, at this point we feel the State Agency should then do the comprehensive interview. At the present time, we have a project in Wilkes-Barre where interviews by adjudicators are being done over the telephone. At least from the adjudicator's point of view, they feel that the telephone interview is producing satisfactory information for them and that the face-to-face contact for the interview would not be required. Since this interview could be done over the telephone, it could satisfactorily be done with a centralized operation.

4. At the present time, Pennsylvania is one of several states involved in the reconsideration interview study (RIS). This study confines the interview to A/N numbers ending in 1, 2 or 3. A telephone call is made first. 17 percent feel the telephone explanation has been satisfactory; 83 percent require the personal interview. However, there is a reversal rate from denial to allowance at the reconsideration level which will further reduce the number requiring an interview. Therefore, our best assumption is at 55 percent of all reconsideration requests would require a personal interview. BDI workload estimate for Pennsylvania for reconsideration for Fiscal Year 1976 is 16,900 claims. BDI also estimates for our RIS study it would require one man year for 415 reconsiderations in the study. Based on these figures, if RIS were to be activated for all reconsiderations, the State Agency would require 41 additional man years at an average salary of $14,270 for experienced disability adjudicator II's. This would require additional funds of $585,070.00 and 41 man years. Other cost factors are as follows:

"Since the estimated reconsideration load is 16,900 claims and whereas 53 percent estimated as those requiring a face-to-face interview, 8,957 reconsiderations would require a face-to-face interview. Present data in our RIS study shows the average cost for subsistence and travel per reconsideration interview is $18.00. Therefore, $161,226.00 would be required for subsistence and travel of the disability adjudicators conducting the face-to-face interview."

Additional space and equipment will not be required. Since Pennsylvania is already involved in the RIS study, the lead time required, in my opinion, for this agency would be four (4) weeks for training of staff. The Pennsylvania Agency is de-centralized to the point of having branch offices in Greensburg, Harrisburg, and Wilkes-Barre, each office serving one-third of the disability population in the state. I feel that further de-centralization would not be required.

5. I do not know what to attribute the quality of the file received from the Social Security District Office. I am not familiar with their staffing and operations and I, therefore, cannot assume that pressure in the district office is a factor in the quality of the file received in the State Agency. However, I wish to comment since the advent of releasing an SSI file from the district office is from 7 to 10 days to the State Agency, the quality has not deteriorated, it was inadequate and is still inadequate.

6. In the issue of cessation and continuance in cases found under a disability by the ALJ's, State agencies are responsible for determining continuing disability issues dealing with questions of medical improvement. In order to cease entitlement the State Agency must demonstrate that medical improvement has occurred over and above his condition at the time of the ALJ's decision. In many cases, medical improvement has not occurred but the State Agency feels that the individual is able to engage in SGA. This poses a problem in that if he is no better medically than he was at the time of the ALJ decision, it raises the question of what right the State has to now write a cessation. Cases involving SGA occurring at a time after the ALJ made a favorable decision, would not reach us as these are decided by the SSA. It has been our recommendation and the recommendation of the CSAVR that many times there has been unjust cessations at the district office level as while SGA may be present medical improvement has not occurred and special consideration given the individual at the time he entered employment had been rescinded by the employer on or before the SSA district office made the decision of cessation due to SGA. I would strongly recommend that decisions of SGA be returned to the State Agency and not continuing to be made by the SSA district office.

7. Regarding the Privacy Act, I previously stated in my testimony of October 3, 1975, that lead time was lacking. An advanced copy of DIL II–61 dated September 19, 1975, was received in the State Agency September 24, 1975, with implementation to be effective September 27, 1975. I will not say there was insufficient lead time, I would rather say there was no lead time. I have been informed by other States that as of October 9, 1975, DIL II–61 has been issued in revised form with a cover memo stating all previous correspondence regarding the Privacy Act are null and void. As of this moment, I have not received the final copy of DIL II–61. However, based on previous instances, our Agency is forwarding form SSA to all applicants we contacted by letter. We are also forwarding SSA 5000 to all applicants contacted by telephone after the telephone call has been made. Regarding notification of physicians for consultative examinations, it is necessary that we revise approximately 100 of our form letters. Until such time as this revision takes place, we are attaching the following statement to the above sources:

"The Privacy Act of 1974 grants the individual the right of access to information pertaining to him in a federally maintained system of records. This means that we are now required by law to release to an indivdiual, if requested to do so by the individual or his authorized representative, medical reports. We can no longer pledge to you confidentiality of medical reports submitted by you."

According to the Privacy Act, all requests to the applicant, where possible, should be in writing. Many times in the past, we were able to contact the applicant by telephone, however, according to the Privacy Act, our efforts will be to use mail. This will result in a time lag and delays in processing time. Prior to receipt of DIL II–61 on the Privacy Act, we have received numerous reversals from medical facilities in the Commonwealth of Pennsylvania saying that according to the Privacy Act, they are no longer releasing medical reports to us. I believe physicians, medical facilities and consulting examining physicians will be reluctant to provide information due to the Privacy Act and its penalties. They are now running extremely scared due to malpractice suits and will probably wish to avoid litigation in other areas. As soon as the DIL II–61 official copy is received, we plan to schedule meetings with other Commonwealth of Pennsylvania agencies that has responsibility for administering the operation of hospitals and clinics to discuss the Privacy Act with them. Many of their reports in the past have been marked "Confidential" and under the Privacy Act, confidentiality no longer exists if the applicant and/or his legal representative requires disclosure. We hope to approach the hospitals and facilities with the idea that they no longer stamp the reports "Confidential" but rather with a stamp "Official Use Only". I might add that in the future, I may not be able to reply to members of Congress regarding the situation of an application without first getting the consent of the applicant.

8. Regarding the State hiring freezes, I wish to state that never in the twenty-one (21) years of the history of the disability program in the Commonwealth of Pennsylvania have we been placed under a freeze regarding recruitment of staff. While statewide policies and procedures are issued and affect all State bureaus and departments, we have been able to have the freeze immediately removed upon presenting to the appropriate official our program and justification for the need for additional staff. Our biggest problem in this area is lead time from Social Security. Recruitment of staff by State Agency personnel and then training staff requires a minimum of six months.

9. I wish to state at the beginning of the program in 1955, the Pennsylvania Agency was de-centralized to the point that we had a Disability Determination Unit in each of our regular Bureau of Vocational Rehabilitation program offices. It was only at the insistence of the Social Security Administration that we centralized operations. Some of the reasons for this centralization was the problems of supervision and training. However, we have been de-centralized for approximately two (2) years, as mentioned previously, having three branch offices each serving one-third of the disability population in the Commonwealth. No applicant is more than 100 miles away from any branch office of DDD and when personnel interviews are required, the nearest local Social Security Administration district office is used, thus, reducing to a minimum the times an applicant is reqiured to travel. I cannot answer the question as to why we do not have uniformity either regarding centralization or de-centralization, however, my recommendations would be de-centralization on a reasonable basis. Arguments regarding de-centralization and the need for it are as follows:

"We feel that our administrative and supervisory staff and medical staff can accomplish much by being closer to the resources that provide us with information. An opportunity for face-to-face situations by the DDD Staff and resources in the Commonwealth are greater in a de-centralized operation. In view of the need to shorten processing time and secure evidence, I feel this can be accomplished better by improving our relationships with the facilities from which we are requesting evidence."

RESPONSE OF SIDNEY HOUBEN

1. Any adverse effect on the quality of decisions caused by the pressures of the Supplemental Security Income program implementation has been reversed and should be completely eliminated in 6 to 9 months. However, any major new caseload introduced without adequate budget provision and planning could interfere with this favorable trend. To date, the numbers of "informal remand" cases received have been small and these have not had an appreciable affect on processing our entire caseload. If every new hearing case were to be remanded to our Bureau on a flow basis as the hearing requests are filed, we would be able to cope with the situation once we have trained additional staff. On the other hand, if we were to now receive a substantial number of the backlogged cases currently being processed by the BHA, the impact might be as devastating as was caused by the Rollback legislation in January 1974 because we would not have had sufficient lead time to hire and train new staff.

2. Based on our limited experience of being able to reverse 21% of the informal remands of new hearings requests that have been received since the end of July, I would have to conclude that giving remand authority to the ALJ's could eliminate a substantial part of the backlog. As a matter of fact, we have suggested to the Regional Hearings Representative in New York that all requests from ALJ's or hearings examiners for development by our agency which are currently being sent to us should be accompanied by the entire case file. This will enable us to reverse the original decision if possible at the conclusion of our work. In effect, this constitutes a remand of the case.

As you are aware from my testimony on October 3, 1975, I believe the record should be closed after the reconsideration decision and any subsequent handling by BHA should be based on that record. This should shorten the period of time between filing for a hearing and decision and reduce the number of reversals based on worsening of condition. At the same time, the claimant's rights could be preserved because a new application is possible if the condition does deteriorate.

3. I do not believe that processing time would be shortened by State agency adjudicators conducting initial interviews. It would constitute poor utiliaztion of

lay personnel who have been trained to be expert in obtaining and evaluating medical evidence. By and large, the district office personnel now do a good job of getting the claimant's initial story about why he cannot work and in listing the medical sources of record. To the extent that there are occasional gaps in the background information or that special expertise is needed in an individual case, we have found that a subsequent telephone interview with the claimant by the adjudicator resolves the problem.

In any event, even if we were required to do initial interviews, decentralization would not be the answer since these interviews would have to be coupled with the interview pertaining to non-medical eligibility factors performed by Social Security personnel in district offices. In New York State, interviews are currently carried out in 76 district and branch offices. It would be unreasonable to consider decentralizing a State agency to that extent. The only feasible answer would appear to be utilization of a field staff for this express purpose.

4. In order to carry out H.R. 8018 as it stands, additional staff time would be needed to arrange and conduct the face-to-face informal conferences. We estimate that no more than five such interviews on the average could be conducted by an experienced well trained person on a given day. In addition, the specific letter required in each denied claim will probably add at least one hour of examining and clerical staff time to each case. Thus, we estimate the need for 10 to 15 percent increase in man-years allocation plus a substantial increase in expenditures for travel. In the event that H.R. 8018 could be amended to permit a telephone interview with the claimant, we believe these estimates of additional resources could be reduced by one-third.

The lead time required to implement H.R. 8018 would include the hiring and training of new staff to replace the cadre of experienced staff who in turn would have to be trained for face-to-face interviewing. Our plan would be to travel such a group throughout the State based on schedules of interviews. Special training would also be required for all reconsideration staff in the preparation of the new denial letters. We believe at least four to six months lead time would be needed to launch such a program in its entirety.

Our Bureau is centralized with the entire operation situated on four floors of the World Trade Center South Tower in Manhattan. We should like to note that this organizational arrangement does not increase to any appreciable extent the administrative problems of face-to-face interviews. It may merely require a little more travel than if we were situated in three or four locations of the State. At present, more than half of our claimant population is within the metropolitan New York area or within 75 miles of our office.

5. The establishment of shorter time pars for transmittal of cases files from the district office to the State agency has not adversely affected the quality of the files received. As we understand it, the shorter time frame requires a quicker decision with respect to the income and resource eligibility factors on an SSI claim rather than in devoting less time to obtaining background information about the impairment which is our principal need. In like manner, eligibility factors in the Social Security case also determines the length of time needed by the district office.

6. Our Bureau has had practically no experience in reviewing continuing disability after a claim has been allowed at the hearing level. In the few cases we have received, we are unaware of any special problems.

7. Under the Privacy Act we will have to notify each physician that a report is subject to disclosure without his consent, providing the patient gives consent. We hope that a single mass mailing to physicians to notify them of these provisions might satisfy the requirements. Otherwise, we would have to repeat this notification each time a request is made for medical evidence. In addition, we will have to take steps to avoid receipt of medical reports that are restricted by the source. The major problem will probably come from facilities such as the Veterans Administration and Department of Mental Hygiene hospitals which normally identify their reports as "confidential". At the present time, these reports may be utilized to support allowances as well as to support a denial at the initial level. We must now obtain only unrestricted reports and we believe the facilities will have greater reservations about cooperating in providing these reports once we make them aware of the Privacy Act.

In this same context, we anticipate that larger percentages of physicians will become uncooperative in providing medical evidence of record. We may also anticipate a reduction in the number of specialists who will be willing to serve on our consultative examination panel.

We expect to enlist the help of the Medical Advisory Committee to our program which was appointed by the New York State Medical Society, in interpreting the new law and in gaining the understanding of the physicians. However, the net result of the Privacy Act will be to increase our processing time because there will be added delays in securing medical evidence.

8. We have not been prevented by State hiring freezes from recruiting staff that have been authorized by the SSA. As a matter of fact, our parent agency has been most cooperative in obtaining necessary State approval to hire staff when there have been freezes that prevented hiring elsewhere in our Department.

Up until December 1974, we had not been affected by federal hiring freezes. However, since that time we have not been permitted to hire any additional staff and were supposed to reduce our complement substantially by attrition. Only within the last few weeks, were we given permission to hire a number of staff that will in effect replace the losses since April 1975.

9. The major arguments for and against a centralized operation are listed below.

For Centralization:

1. Economy of operation.
2. Simpler management and case controls.
3. Greater uniformity of operation.
4. Opportunity for greater flexibility in utilization of staff and introduction of change.
5. Opportunity for greater participation in the development and dissemination of new and revised instructions.
6. Simpler reporting to SSA.
7. Smoother relationships with BDI in terms of administrative reviews and visits.
8. Availability of Review Physicians in all specialties to function on agency staff.

For Branch Offices:

NOTE.—I am listing below the arguments that have been advanced for decentralization. However, I am not convinced that these positions are necessarily beneficial to our program.

1. Geographic breakdown of the workload would bring the office closer to the community.
2. Opportunity may be afforded for closer contact with individual physicians and medical facilities in the community for the purpose of interpreting program needs.
3. Closer proximity to claimants for face-to-face interviews (presumably at federal district offices that would be closer to the State agency).
4. Better opportunity for field visits to obtain medical evidence from hospitals.

I suppose there is lack of uniformity in terms of the organizational arrangements in different State agencies because there is no universality of agreement as to the best method of operation. I suspect that local conditions and preferences have been controlling. I believe that the SSA always encouraged centralization of State agency operations until about three years ago. Developments since that time, including the advent of the tremendous SSI Program, the Kelly-Goldberg decision, and discussion of face-to-face interviews, have led to encouragement in the opposite direction and several more States have decentralized on those bases.

RESPONSE OF B. J. MARETT

1. There is no question that the SSI program has had a monumental effect on case processing. The tremendous influx and lack of uniformity of instructions received by State agencies as a result of the SSI program, and the crises created by systems failure have been described in the past. Not only have we been required to perform inventories and systems re-input, but we have also been required to perform extra reporting on a daily or weekly basis. BDI's preoccupation with emergencies has considerably lessened effective leadership and policy guidance for regular program administration. Assimilation and interpretation of the various and conflicting instructions has required a significant part of State Agency staff and has cut into staff for regular adjudication. It is obvious that the quality of the decision has suffered.

While the remand procedure does not imply the overall mass of instructional changes and program re-structuring required with the implementation of SSI, it does have the potential for far reaching effects on the regular adjudication of cases. Our staff is well aware that ALJ decisions are often not consistent with policies of the disability program as transmitted to the DDS by BDI. This point was brought out during testimony before the committee. It is extremely difficult to insure that remand staff remain consistent with regular workload policies when they are acutely aware that ALJ's often allow claims on subjective evidence with less documentation than required by our interpretation of the law and regulations. It is almost impossible to prevent this inconsistency from having an adverse effect on initial and reconsideration examiners. Also, additional work without additional staff always affects the quality of adjudication. It is demoralizing to State Agency staff, when we are called upon to help process a backlog of claims under BHA jurisdiction and we see no evidence that BHA is attempting to substantially reduce the backlog themselves.

2. Our experience in attempting to comply with ALJ requests has proven conclusively that in many instances, they do not use selectivity in their requests for development of medical evidence. This creates serious medical relations problems.

The ALJ's do not usually have a medical consultant involved in their requests for medical evidence, with the result that sound medical judgment is often not used. Routinely, their mode of development is diabolically opposed to the philosophy, policy and concept of development used by State Agencies. If we are to continue to make decisions and pay benefits to approximately half of the people who apply for benefits, we must have the cooperation and assistance of local physicians. We are already struggling to cope with the wide gaps and discrepancies in policy guidance from BDI and Central Offices and remands from ALJ's will only add to this problem.

We are almost certain that the result would be a shift of the backlog from the ALJ's to the caseloads of the State Agency. This is contrary to the concept of the disability program and it does not reflect justice to the claimant.

For the above reasons, we have grave reservations about the possibility of remand from ALJ's.

3. The State Agency processing time would undoubtedly increase, but the overall processing time would be shorter if administratively this could be done. We feel that unnecessary time is spent after the initial interview before transmittal of the case to the State Agency from the District Office, and naturally more definitive information would be secured by a person responsible for adjudicating the claim. In spirit, the concept of State agency initial interviews is desirable to us, but this would require more decentralization than has been envisioned to implement this procedure effectively.

4. We will need 15–20 additional man years to carry out H.R. 8018. South Carolina would require very little lead time, because we have already done the substantive and procedural training for reconsideration interviews. We would plan to open another branch office, with staff already existent. This might mean a slight additional cost, if space presently leased could not be subleased, but the overall State Agency budget would be essentially the same within a one or two year period. South Carolina is now a decentralized State Agency operation.

5. For instance, just this summer, the Social Security Administration has stated that the SSI disability claim can be held no longer than seven days in the District Office, and just recently they have imposed a ten-day limit for social security cases. Will this reduce the quality of the file which is sent to the State Agency?

It has been a long time since the State Agency has received high quality disability claims from District Offices. Frankly, it is hard for us to envision how the quality could be reduced, and we doubt that the existent poor quality is affected by imposed time limits. We think that the time limits imposed are very liberal and should not, under any circumstances, create any hardship on the district office or the claimant.

6. This is a definite problem which occurs when the medical evidence used by the Administrative Law Judge does not show an impairment or combination of impairments substantiated by objective findings, which are of a level of severity to significantly reduce the residual functional capacity of an individual to perform gainful employment. It appears in many situations the ALJ has given a medical-vocational allowance; however, frequently these allowances have involved younger workers (under age 45) who have high school or college educations, with the functional capacity for at least a wide range of light work. We are faced with the problem of continuing such claims because there has been no medical improvement, the alleged symptoms have not changed, and there has been

no significant improvement of vocational skills. The conflict arises because these claims would never have been allowed by the State Agency to begin with.

The above type of continuance problem is most frequent. However, occasionally the State Agency receives a claim for review on continuation where work is an issue that was resolved by the ALJ in a different manner from that required of the State Agency. A claim may be denied on the basis of a claimant's performance of gainful activity and then reversed by an ALJ. The State Agency is faced with the problem of trying to find medical improvement. One such claim was received for which the beneficiary stated that he had never alleged to be completely disabled, but merely needed extra money to live on and did not feel physically able to work at a second job.

Regulations used by the State Agency do not provide adequate means for ceasing such claims. The only basis for cessation is medical improvement, or significant improvement of vocational skills. The only other option is an adverse reopening and revision of the determination. The attitude our continuing disability examiners have been forced to adopt has been one that it is useless to try to cease a claimant without a significant disability, when all the claimant need do is file for a hearing and be continued by an ALJ.

7. We have always pledged confidentiality of reports when dealing with physicians for disability purposes. Although we have had no experience with the new privacy act, we do have thirty years experience in dealing with the medical community. This experience leads us to feel certain that we will meet considerable resistance on the part of the medical community. In administering and carrying out the disability program, we can conceivably do without many components of the system, but we cannot make disability decisions without the cooperation of physicians in our State. We are already experiencing increasing difficulty in obtaining medical evidence which is the primary reason for any increase in processing time, so it naturally follows that resistance from the medical community will further increase processing time.

8. We have had absolutely no problem with State hiring freezes. We have had problems with Federal policies in authorizing and then withdrawing staff allocations. A constant changing from a man year concept to a full time employees concept is confusing, to say the least, For example, we were allocated 153 man years on July 1, 1975. Then on September 24, 1975 an evaluation was made of our workload realization and we were allocated 161.5 man years. However, in the same letter informing us of our allocation of man years, our full time positions on duty were frozen at 152.

9. The primary reason for the lack of uniformity in opinions about decentralization is that, until recently, SSA has taken a strong stand against State Agency decentralization. A continuous fight has been waged against it, and this attitude carries over to the present, even though federal officials now allege no preference for State Agency organizational structure. One of the states in our region has been decentralized since the beginning of the program and they have done so only under a great deal of pressure against the decentralization concept. After so many years of centralization philosophy, acquisition of adequate office space, and permanency of staff members, it is extremely difficult to transplant office staff for decentralization without some hardships on personnel.

It is difficult administratively to effectuate the decentralization process, in terms of training, reporting and procedural details. Once this interim period is accomplished, these problems are overcome. There exists also a great challenge in administering a decentralized program because of the very separation of offices, but this obstacle can also be overcome with effective utilization of administrative staff. It appears to us that decentralized states with which we are familiar consistently rank high in quality and production statistics.

The advantages of decentralization are:

(1) More effective and expeditious case processing;

(2) Improved relations with the local medical community through more personal contact and increased familiarity;

(3) Increased cooperation and communication with SSA District Offices, Vocational Rehabilitation, Social Service Agencies, and all other government agencies; and

(4) More State Agency contact with claimants.

Even though the SSI program has been an almost impossible task, we feel that our decentralization operation in South Carolina has made it possible for us to survive and rank high in the performance of service to our claimants.

RESPONSE OF MORRIS E. SORENSON

1. As was pointed out in our earlier response to the Committee, we made the observation that the Supplemental Security Income program certainly had a profound effect on State Agency operations because of the dramatic increase in the number of cases and pressures to process these cases in a minimum amount of time. Because of long delays experienced in the hiring and training of professional and clerical personnel prior to the actual receipt of SSI cases, in our case the situation became very critical. The Regional Office in Denver assigned professional staff to assist us and although we did appreciate the efforts of these Federal personnel, we did have a problem on quality control in case adjudication. It was during this period that we felt that there was somewhat of a loss of quality in our disability decisions because of the urgency of moving the cases.

In the meantime this situation has been corrected and we are now in full control of both Title II and Title XVI programs. We feel that we are maintaining high quality of performance in both programs. We currently have a well trained and experienced staff and will be able to process remand cases without affecting the quality of our work. Experience to date has shown that we have received very few informal remand cases and those have posed no particular problem for us. We feel that this procedure should have a restricted time limit say, for example, a termination date of June 30, 1976.

2. In an effort to reduce the pending backlog at BHA level, we would agree to the proposal of giving the ALJs authority to remand cases back to the State providing certain guidelines are followed. We feel that definite criteria should be established and followed by the ALJs in remanding cases. A case wherein the evidence on file meets one of the following criterion could be considered eligible for remand:

(1) A changed or worsening physical or mental condition.
(2) There is a new impairment not mentioned in the original allegation.
(3) Report of recent hospitalization.

In connection with this proposal of permitting the ALJs authority to remand cases back to the State, I would like to recommend to the Committee that further consideration be given to the suggestion made by my colleague from Tennessee, Mr. Brown, in his statement on October 3rd. When one of the Committee members suggested that it may be necessary to excise or remove some of the steps in the appellate process in order to shorten the time frame, Mr. Brown suggested that the Social Security Administration adopt a system currently used by the Veterans Administration. The VA has a panel consisting of a claims adjudicator, a physician and an attorney. This panel reviews cases which have been denied in the system up to that point. It would seem to us that a similar type panel could be utilized to advantage by the Social Security Administration in reducing the number of cases which reach the appellate level. This panel could follow a system of guidelines suggested in the paragraph above and remand those cases which meet the predetermined criteria.

Although we would agree to the suggestion that Administrative Law Judges be permitted to remand cases to the State Agency, we would once again like to emphasize that this procedure be carried out under predetermined guidelines. We would object strenuously to an agreement whereby Judges would be permitted to routinely remand "problem" cases at their own discretion to the State. Consideration should be given to closing the record after reconsideration. This would force the Hearing Examiners and ALJs to consider the case on its merits.

3. We would like to strongly recommend that the initial interviews be conducted by State Agency adjudicators. We feel that this procedure would shorten the processing time by at least five to seven days. We also feel that this face-to-face contact at the initial level would reduce to a minimum the anxiety and frustration which is now so apparent in the majority of clients whose case may have been pending for some weeks in the processing pipeline.

If the decision is made to have the initial interview conducted by a State Agency examiner, it would necessitate a decentralization of our State operation. This changeover could be very easily accomplished. The major portion of the population in Utah is concentrated in an area along the Wasatch Front extending roughly from Utah County in the south to Cache County in the north, involving a distance of about 125 miles. If our operation should decentralize, we would establish a district office in Ogden, a district office in Provo, in addition to the main office in Salt Lake City. Additionally, we might possibly have a fourth district office in a rural area such as Richfield in central Utah or Cedar City in the southwestern part of the State.

4. We support the provisions of H.R. 8018 and feel that the enactment of this bill will improve the overall operation of the Disability Insurance program. Without going into the details involved in the implementation of the provisions of this Act, we estimate that we will need an increase of about 10 percent in staff and an overall increase in budget of about 10 percent.

It would be necessary to have a minimum of six months lead time at the State level before the implementation of this Act.

At the present time the DDS operation in Utah is centralized in one office in Salt Lake City, Utah.

5. The pressure of the Social Security Administration for speed has had a marked and negative effect on the quality of the file which we have received from the District Office. As noted in our earlier report to the Committee, the quality of the reports forwarded to the State Agency from the District Office has noticeably deteriorated. Also, the quality and amount of information obtained during the initial interview has noticeably declined since the inception of simultaneous development in 1970, and even more dramatically, since the implementation of the SSI program in January 1974.

It is our impression that whenever the Social Security Administration places pressure on the District Office to move cases within a short period of time, the quality of development of the case at that level suffers. At the State level we are greatly concerned over the poor quality of reports reecived from the District Offices, especially that information which is supposed to be included in the form 401—information which is extremely vital to the adjudicative process.

6. From the standpoint of an Administrator, this is one of the most difficult problems which we have to deal with in trying to make a sensible explanation to disability claims examiners at the working level as to why and upon what basis certain cases have been reversed by the Administrative Law Judges. In years gone by, it was customary for the Administrative Law Judge to explain the basis for their decision. However, because of the heavy workloads, many of the decisions are now announced on the short form and there is no reason or rationale given to support the reversal of the State Agency decision. Our disability claims examiners feel that the program is operating under what appetars to be two different standards of disability and that the Administrative Law Judges, in many instances, completely ignore the medical criteria. The general feeling in our Agency is that what happens to be arbitrary decisions by the Administrative Law Judges in reversing State Agency decisions is demeaning to the work performed at our level.

The critical attitude and feelings which the professional staff at the State level have toward the Administrative Law Judges for making many of their reversals are based on facts directly related to experience and specialized training in the field of disability evaluation.

For example, our disability claims examiners have been carefully trained in the area of disability evaluation to include a thorough working knowledge of the medical criteria involved, the importance of the vocational factors, age, and past work experience. Stress is always placed on the objective medical criteria which have proven their validity over the years and which have been the backbone of the Social Security Disability Insurance program. Whenever a decision is reversed by an Administrative Law Judge wherein the medical criteria seemingly were ignored in arriving at the final decision to reverse, questions and doubts arise as to what constituted the basis for the decision.

"I would like to illustrate the point by citing a specific case. Briefly stated the facts are these: A 46 year old client has 12th grade education and his most recent work history was a mine mill mechanic. He filed for Disability Insurance Benefits in a Midwest state which denied the claim on March 8, 1972, on the basis of insufficient severity coupled with apparent transferable skills for lighter work. The diagnosis was low back pain with essentially normal physical and laboratory findings.

"The claimant filed for reconsideration and was again denied at the reconsideration level by this same Midwest state on September 1, 1972, on essentially the same basis. The claimant filed a request for a hearing and the State Agency deciison was reversed by an ALJ on March 15, 1974, on the basis of the testimony of an attending physician along with the personal observations of the ALJ. The case was diaried for medical review and in the meantime the claimant moved to our State.

"Attempts by our staff to obtain the cooperation of this claimant in obtaining a current consultative examination were not successful due to the attitude on the part of the client who stated that the physicians in this area were all unreliable and would not give a fair report on his condition. After failing to obtain the claimant's cooperation in obtaining a consultative medical examination, the State Agency wrote a cessation determination on the basis of a lack of cooperation. We forwarded the case to the Regional Office with the recommendation that the cessation determination be approved or be forwarded to Central Office Policy Branch.

"The Regional Office forwarded the determination to BDI Policy Branch for a decision. At that level the questionable decision was made that the case should never have been diaried for medical review and that the claimant should be placed in permanent payment status. The disturbing factor in this case was centered on the medical evidence which was on file and which had been provided by the State which made the initial and reconsideration determinations. Our medical staff carefully reviewed this medical evidence and fully agreed with the action which had been taken by the other State Agency.

"It appeared to our staff that the ALJ based his decision on the claimant's court room behavior together with the testimony provided by the attending physician. Incidentally, the Midwest state did have excellent medical reports with sufficient objective findings to refute any statement of disability made by the attending physician. From the State Agency standpoint, it appeared as though the Administrative Law Judge ignored the Social Security guidelines for Disability Insurance Benefits and the ample medical information which was already on file. An additional disappointment to us was that it appeared as though this claimant's threats to do bodily harm to examining physicians or to inquiring State Agency staff personnel, motivated the Policy Branch at Central Office to sidestep the review guidelines and arbitrarily decide to maintain the claimant in permanent beneficiary status. The case history, therefore, suggests that a claimant can obtain permanent disability benefits, notwithstanding the lack of severity, by simply demonstrating the countenance of a sick person while in court and by exhibiting sufficient aggressiveness during a continuing disability investigation."

In the light of that part of the DISM, 353.5B, wherein it states that: "There could be exceptional situations encountered where though the CDI reviewer is of the view that disability does not presently exist, there is evidence that medical improvement has not occurred since the initial disability determination. In other words, there may be a question whether the individual was properly entitled to benefits in the first place or whether benefits should have previously been continued. In this situation, absent significant improvement in vocational competence . . . a continuance should be prepared . . .", an ALJ's faulty decision can only serve in watering down the disability standards and in making the entire SSA program lose its credibility.

7. Unfortunately, the State Agency was given little lead time for the implementation of the Privacy Act of 1974 (PL 93–579). This situation has resulted in rather frantic last minute efforts to prepare a satisfactory message to be sent to those members of the medical community with whom we do business apprising them of the provisions of the Privacy Act. Following our request for guidance on this matter, we finally received a TWX message from BDI on October 10, 1975 in which specific instructions were given to disseminate provisions of the Privacy Act to the medical community. However, the actual message which was sent out by the Central Office for dissemination, in the opinion of our physicians, is much too involved and lengthy to be effective in dealing with physicians. Also, the way in which this message was phrased could possibly have a negative effect on the medical community by throwing a scare into them for possible failure to comply with the provisions of this Act.

Our Chief Medical Consultant has written a brief simply message which we plan to include in our letters to physicians who are asked to perform consultative examinations or to provide evidence of record. This message will be included as part of our correspondence in all types of letters going to the physicians. This is a step which takes extra time and effort in order to notify the physicians of the Privacy Act.

In those instances where the reporting physicians and hospitals have stamped their medical reports as "confidential" it will be necessary for the State Agency to return those reports to the reporting sources with a request that the stamp of "confidentiality" be removed. Also, in the case of certain types of derogatory information or information of an embarrassing nature, a similar procedure of returning the record to the reporting sources for deletion of certain material may be necessary. Inasmuch as this problem is of major concern to our medical staff, I have asked our Chief Medical Consultant to comment on this paragraph and how, in his opinion, the Privacy Act may affect our operation. Following is his statement:

"I have been asked to prepare a statement of the possible effects of The Right of Privacy Act upon our operation as related to medical affairs.

"The first of these effects relates to the responsibility our Agency has to notify physicians who do business with us and communicate to them an understanding of the provisions of the Act and the probable need to disclose all the evidence they provide us to the applicant upon his request. This process, although requiring some time and effort, is not too difficult to implement.

"The second effect, which is clearly predictable, may be a sharp reduction of the sources of evidence. Many physicians may decline to supply evidence to us out of fear of harassment and antagonism on the part of the applicant whenever their information is likely to be adverse to the disability decision. Adverse comments within the community can be very destructive to a physician's reputation and many physicians would prefer not to become involved. There is also a very sensitive atmosphere in the medical community at present concerning malpractice actions. Physicians may become reluctant to work with patients with whom they have no acquaintance nor reliable rapport in the fear that they will be implicated in law suits.

"The third effect is that this law may result in alterations in the quality of evidence supplied. It is very likely that physicians will delete judgments regarding evidence of malingering, and evidence of exaggeration of symptoms. They will make no comments about state of cleanliness, nor are they likely to make references to drunkenness or to mental and behavioral aberrations on which would otherwise no remarks would be made. They are going to be less willing to make estimates of work capacity. They are also likely to be slanting evidence to make it as favorable to the applicant as possible. Physicians will not want to be cast in any kind of light which will make them appear to be giving evidence adverse to the decision. Many physicians will be led by this Disclosure Act to the temptation of becoming aggressive in support of their patient's claims, rather than run the risks of antagonizing them. This will be particularly true when they haven't been able to achieve any great successes with the patients therapeutically. The psychology at least will be to secure for them as many advantages other than therapeutic effects that they can.

"The fourth effect will be a shift toward defensive adjudication. There will be an alteration in the degree of documentation and the frequency of consultative examinations ordered by the State Agency. All of this may involve extra time and expense to the Agency and to the whole process.

"DIL II–61 from Central Office dated September 25, 1975 lists in Section 25, Paragraph A9, under Civil and Criminal penalties of the Privacy Act, which states 'The agency is held accountable if it fails to maintain an individual's record with such accuracy, relevance, timeliness and completeness as to assure fairness in any determination relating to entitlements to benefits or other rights that may be made on the basis of such record and consequently a determination is made which is adverse to the individual'."

8. Notwithstanding the fact that the Disability Insurance program is entirely financed by Federal funds, there have been periods in the past when either State personnel practices or the attitude of the State Administrative Officials prevented the hiring and training of needed personnel. Part of this problem in the past could well be attributed to the fact that we were a small unit with a comparatively small workload and, therefore, did not merit the consideration that would have been given to a larger program. However, with the advent of the Black Lung and the SSI programs which brought increased workloads and the requirement for larger staffs, this unit has come of age and its needs are respected and met by State officials. At the present time we are encountering no problems as regards personnel freezes from the State level.

On the other hand, we do have a Federal freeze brought about by the need to economize at all levels. This freeze does have a direct bearing on our operations and occasionaly does cause us some concern. For example, if one of our professional or clerical staff should terminate tomorrow, we would not be permitted to initiate action to replace the departing staff member without prior approval from the Regional Office. This is not an automatic approval upon request. Apparently the Region has a personnel quota to maintain and we are allocated personnel based primarily on workload requirements. At times this does pose a problem for the smaller states inasmuch as we are required in many respects to perform essentialy the same functions as the larger states and, therefore, we are required a certain number of personnel regardless of the fluctation of workloads.

Although we may have some concern over the effect of the Federal hiring freeze, in day-to-day operations, we maintain a close working relationship with the Regional Office and in most instances they do comply with our requests.

9. Utah is a state with a rather small population which is largely concentrated along the Wasatch Front. Our operation has always been centralized in Salt Lake City. To date, we feel that this centralized operation has enabled us to operate more efficiently than if we had been decentralized. In our central location with the parent agency, we have the advantage of being able to utilize the Division facilities on a joint basis.

On the other hand, we have seen from actual experience the value of the face-to-face contact at the reconsideration level and have supported in our statement the possible value of a face-to-face contact at the initial level. In order to make this possible, we feel that our operation would have to be decentralized into three district offices—one in Ogden, one in Provo and the main office remaining in Salt Lake City. This arrangement would permit the DDS staff to work much more closely with the district offices and, most importantly, with the claimants who are filing for Disability Insurance benefits. There might be some minor additional expense involved in decentralizing our operation but the benefits derived therefrom would far outweigh this little added cost to the program.

As regards the question as to why we don't have uniformity in the State Agency operations, this can probably be attributed to such factors as total population and its distribution within the respective states, geographical features of the state, and the administrative structure of the state government.

RESPONSE OF GLEN M. SWISHER

1. We had inadequate lead time to acquire the necessary office space, equipment and staff to be fully ready to handle the Supplemental Security Income Program workload when it first hit us. Therefore, we went through a period of time when we had substantial workload pressures which probably affected the quality of our decisions for a period of time. We currently have our workload under control, and, we believe, are turning out quality decisions.

We have received remanded cases for about nine months. This work constitutes an additional workload that had not been included in the planning at the time of our appropriation. We have, however, been granted some additional positions and are handling the remanded cases without undue problems at this time. I might add, it is important to us that the appropriation for the current fiscal year be made very soon because the continuing resolution under which we are currently operating does not provide the necessary funds for our present level of operation.

2. At the present time I think this might be a good course to follow provided that the State agency is given the prerogative of saying to the ALJ "there isn't anything else we can do to the case" and return it to them. Such remands should also of course require that the State agencies be given the necessary manpower and money to handle the remands.

3. To answer the first part of your question first, I am not sure whether or not the State doing the initial interview would shorten the processing time of initial cases. It might. It certainly would not increase the processing time. The greatest improvement, I believe, would be in the quality of the product as I believe we would be more certain of getting the applicant's entire story and learning all his medical sources. This would result in a higher quality product at the initial level and should reduce the number of cases that would go to the reconsideration or other appeals levels.

To answer the second part of your question—we are already de-centralized. However, if we were to do the initial interviews, I would want to consider further de-centralization. We now have five district offices. We might need to add five or six branch offices.

4. Our best estimate is that we would need 10 additional professional staff members and five additional secretarial staff positions. This would require an approximate additional $200,000 to cover all costs—salaries, travel, office space, equipment, etc.

Sixty to 90 days lead time will be required. Ninety preferably.

We are de-centralized; we currently have five district offices.

5. For instance, just this summer, the Social Security Administration has stated that the SSI disability claim can be held no longer than seven days in the district office, and just recently they have imposed a ten day limit for social security cases. Will this reduce the quality of the file which is sent to the State agency?

We have observed a general deterioration in the quality of the product we are receiving from the district offices. This varies somewhat from one district office to another but is a general trend which has existed for the last 12 to 18 months and certainly is not improving. I really don't know whether this deterioration is caused by time pressures or other factors. I would suspect the time pressures to have an effect.

6. ALJ's rarely place a medical diary on a case, therefore, we have received such a few continuing disability cases that have been allowed at the hearing level that we really don't have enough experience for a satisfactory answer.

7. The only additional steps that will be required in procuring medical evidence is to make sure that the physician providing the evidence understands the Privacy Act and that the patient will be able to see his report, in fact get a copy of it, upon request. This will not adversely affect processing time seriously unless physicians stop reporting factual data to us. If that should occur a great deal of additional time will be required cajolling the doctor into giving us needed evidence.

The additional work required in informing doctors and other sources as well as the additional record keeping will place an additional load on a staff that already has all it can do. Therefore, these additionl duties rebound to adversely affect processing time. This problem can be solved eventually by the addition of staff.

8. Although the program is entirely financed by Federal funds, can a State hiring freeze prevent adequate and timely staffing?

Yes.

Have Federal hiring freezes also affected your operation in this regard?

Yes.

9. Most states were set up in the beginning of the disability program as centralized operations because this was the way the Social Security Administration wanted it done. A very few states, Missouri was one of them, set up the disability determination operation as a de-centralized operation at the beginning of the program. This was done over the loud protest of SSA.

We, in Missouri, believe in the de-centralized operation because it puts our adjudicators in a geographic proximity to the applicant so that they can visit those applicants when the need is apparent. Our adjudicators also visit and get to know the physicians and other medical resources in their assigned territory, therefore, are able to obtain a better quality product in a shorter period of time. De-centralization requires somewhat different operating procedures than are required in a centralized operation and is, I believe, a bit more demanding on the program administrator. The Bureau of Disability Insurance now endorses de-centralization, therefore, more and more states are moving in the direction that we knew was right from the beginning of the program. Some states are. of course, resisting de-centralization for a very understandable reason, such as the reluctance of staff members to relocate etc. We firmly believe in decentralization and think it is the only way to handle the operation.

Mr. **Burke**. We will now hear from the Hon. Carthon P. Phillips, National Association of Disability Examiners, Austin, Tex.

You are recognized, Mr. Phillips. Identify yourself and you may proceed.

STATEMENT OF CARTHON P. PHILLIPS, PRESIDENT, NATIONAL ASSOCIATION OF DISABILITY EXAMINERS, AUSTIN, TEX., ACCOMPANIED BY LEWIS D. BUCKINGHAM, PRESIDENT-ELECT

Mr. **Phillips**. This is Lewis D. Buckingham, who is president-elect of the association.

Mr. **Burke**. He looks very familiar to the committee.

Mr. **Phillips**. I am from Austin, Tex. Mr. Pickle can tell you where that is, Mr. Chairman.

As elected president of the National Association of Disability Examiners, I represent that organization of approximately 2,200 members.

I will summarize as much as possible, Mr. Chairman, in the interest of time, but I want to present this question in four parts. First is the basic program [illegible]d second is program changes during recent years. The third is the plight of the claimant, and the fourth is the position of NADE.

The basic [illegible] except for explaining some of the acronyms, I am sure eve[illegible]e knows what the basic program is, but suffice it to say th[illegible]ic program, as the disability examiner looks at it, and I hav[illegible] here today that there is a lot of subjectivity in disability and reconsideration claims.

I submit to you, Mr. Chairman, that the disability chairman is the professional staff person and he makes decisions based on hard clinical evidence, and leaving subjectivity completely out of it, if possible.

Part 2, program changes during recent years.

In mid-1973, came the expansion of the program in Social Security Title II.

Program changes during recent years. In mid-1973 came the expansion of the program from Social Security (Title II) determinations to include Supplemental Security Income (SSI–Title XVI) determinations. This required a near doubling of the DDS staffs in both professional and clerical job slots. This required disability examiners to absorb new and complex procedures.

Some of these changes were: New concepts of onset date, assessment of drug addiction or alcoholism, presumptive disability decisions based on sketchy or lay medical evidence, elimination of 100 percent review by the Bureau of Disability Insurance (BDI) and acceptance of in-house review and postadjudicative review. Also, continuing disability review of SSI claims.

A great number of the more experienced DE's became quality assurance specialists. This in-house quality control probably kept the programs and all concerned from getting into more trouble than was experienced in the form of overpayment, nonpayment, multiple payments to the same payee, and so forth.

During 1974–75 litigations brought about several studies which were national in scope and required DE expertise to conduct. The due process and reconsideration interviews require personal contact with the claimant to assure complete and accurate documentation and to provide the claimant an awareness of the evidence obtained to document the claim and how the law applied to his particular claim.

Another study called the informal remand study called for a prehearing review by an experienced DE of those claims where an unfavorable reconsideration determination had been made. Upon review of the claim, he would reopen and revise it to a favorable decision or affirm the prior denial. In a wide majority of cases the prior denials are confirmed and the fully documented claim is then referred on for hearing by an administrative law judge.

This evolution of the disability programs has placed the disability examiner in a role of having to know more or do more while trying to follow a proliferation of regulations, directives, policies, and temporary-type instructions.

During May and June of this year, an inventory of temporary type instructional documents was made by BDI. The draft I read did not give a date enclosure on this, but presumably it was at the time of the SSI program implementation. These included only nonmanualized documents issued by BDI Central Office or Regional Offices for direction and guidance of the disability programs. The study shows that, on the average, the DDS was issued approximately 151 pieces of instruction outside of the basic manuals.

The central office of BDI issued 105 temporary-type instructions for the use of the DDS's. This is not to imply that these instructions were not needed in the majority of instances because over one-half of these issuances are in some stage of being manualized. Further details on this can be gleaned from a BDI draft of "Report on Inventory of Nonmanualized Instructional Material," dated July 10, 1975.

There has been enough said here today that I think the claimant is often left in a frustrated state of confusion as he follows or tries to follow the processing of his claim. So I am going to leave that as it is in the document to be made part of the record.

Now, No. 4, the concerns among disability examiners about the areas I have touched on above have been mounting for about 3 years. These concerns have intensified since the advent of the title XVI (SSI) programs. These concerns have been discussed, argued, and deliberated at NADE conferences big and small across the land until finally we (NADE) have reached a position which we now respectfully present in the form of two resolutions.

At the NRA Annual Conference in Las Vegas in October 1974, the NADE assembly of delegates adopted to following resolution:

> Whereas it has come repeatedly to the attention of the Association and its Executive Board that there is considerable dissatisfaction with the present state/federal system of administering the SSA–SSI disability programs, both in terms of salary and other inequities of employees, and the difficulty of administration by multiple semi-independent agencies, and
>
> Whereas congressional interest is now being focused on the administration of these programs, and
>
> Whereas the manner in which such a transition would be made is of the greatest importance to members of our Association. Therefore be it
>
> *Resolved*, That should any action on the part of the NADE Board or any other party result in legislative action to effect federalization, of the state DDS's, the NADE Executive Board, and such NADE committees as shall be designated by the President shall approach the legislature and work actively to insure that the rights of examiners and other state employees are protected. Be it further
>
> *Resolved*, That the following guarantees be sought:
>
> 1. That all state DDS employees shall be accorded certified status as federal civil service employees.
>
> 2. That no state DDS employee, as a result of incorporation of his agency into the SSA, shall suffer: (*a*) A loss of pay; (*b*) a loss of seniority rights; (*c*) a loss of accumulated annual sick leave.
>
> 3. That adequate protection be given to the accumulated rights to state retirement benefits held by each state employee. Be it further
>
> *Resolved*, That with respect to preservation of these retirement rights, the Board shall be guided by the precedent of the National Guard Technicians of 1968, meaning the NADE board.

In April 1975, at a called meeting of the NADE Executive Board in New Orleans, the following resolution was adopted:

Whereas the National Association of Disability Examiners is primarily interested in the professional adjudication of disability claims, the Executive Board declares that it believes the most efficient means of handling disability claims is its goal, and

Whereas the NADE Executive Board has agreed that federalization of the state disability determination services appears to be the best way to handle disability claims, and

Whereas many basic questions remain unanswered. Therefore be it

Resolved, That we direct the President of NADE to question the House Ways and Means Committee to resolve the issues raised in the Las Vegas Resolution on federalization which was passed by NADE. Be it further willingness to meet with them to discuss any legislation which would affect our profession in the event that it is found that federalization is the best means of serving the disability applicant.

Further action was taken by the Board as follows:

To implement the policy of the NADE Executive Board as stated in the Resolution of April 26, 1975, such committee or committees as are necessary shall be appointed by the President of NADE to draft proposed legislation toward federalization and to work with the Ways and Means Committee and such other committees of Congress as necessary to effect the sense and intent of said Resolution.

Reference is made to the last paragraph of the NADE New Orleans resolution. As Disability Examiners, we do not presume to write finished articles of legislation and expect them to be accepted verbatim as articles of any bill for a change in the law. However, we are prepared to provide a draft which provides for the central theme and many specifics of what we think the bill should include if there should be a change in law. This draft deals with and provides proposed articles for equitable portability of Disability Examiner careers. It includes:

A. EQUITY IN SALARIES

I read this a while ago when the previous panel was here.

Current salaries for initial claims examiners vary from over $13,500 in Alaska to less than $8,000 in West Virginia. Reconsideration specialists get around $14,000 in Texas and less than $8,000 in Oklahoma. A firstline supervisor is paid over $15,000 in New York and less than $9,000 in Puerto Rico.

B. RETIREMENT BENEFITS

In the event of "federalization," the DE should be granted equitable portability of retirement credits from State to civil service status.

C. ANNUAL LEAVE AND SICK LEAVE

In the event of conversion of civil service, the DE should be granted equitable status under civil service including accrued leave in both categories.

D. GROUP HEALTH AND LIFE INSURANCE

Where applicable, a waiving of the 12-year requirement for the DE to be covered under the Federal group health and life insurance programs.

E. FEDERAL COMPENSATION FOR INJURY AND DEATH

Equity for the DE should he be converted to civil service status.

F. SEVERANCE PAY

Equity in the event of conversion to civil service status.

G. TENURE

Tenure would be significant in the event of a RIF or abolishing job slots. For example, the DE with the greatest length of service, or tenure, would be retained if all other circumstances were equal.

H. TRANSITIONAL OPTION

In the event of federalization, some DE's nearing retirement age would probably be found ineligible for conversion to civil service. Those individuals should be granted the option to remain in State employee status for up to 5 years rather than being terminated upon effectuation of the law.

Mr. PICKLE. Excuse me, Mr. Chairman. This is a constituent of mine.

I have to be in the cloakroom, and this is a vote. It is the second bell.

Mr. BURKE. Yes.

Mr. PHILLIPS. Thus, in as few pages as was possible, you have the position of NADE in this very important matter of service to the Nation's handicapped people. It seems only appropriate to conclude with the basic philosophy of NADE which is simply stated in the preamble of our constitutions. I speak for the examiners, who 10 years ago adopted this as their philosophy:

> We, invested with the responsibility for determining the extent of physical, emotional, and mental impairment and the work limitation imposed therefrom upon persons claiming benefits emanating from contractual agreements or from gratuity, do unite under the Constitution to establish the National Association of Disability Examiners, a Division of National Rehabilitation Association, to develop the public trust in our integrity and judgment. To this end, we hereby affirm that we seek the equity of the applicant and the contractor and of the development of the full potential of the applicant through adequate rehabilitation services.

Mr. Chairman, on behalf of NADE, I thank you and the committee for listening.

Mr. BURKE. If you will submit the proposed draft to the committee, the staff will examine it.

[The prepared statement follows:]

STATEMENT OF CARTHON P. PHILLIPS, PRESIDENT, NATIONAL ASSOCIATION OF DISABILITY EXAMINERS (NADE)

Mr. Chairman and members of the subcommittee, my name is Carthon P. Phillips. I'm from Austin, Texas and as elected President of the National Association of Disability Examiners (NADE), I represent that organization of approximately 2,200 members.

I. THE BASIC PROGRAM

The Disability Examiner or Disability Adjudicator (an alternate job title) makes the disability decision or disability determination on both the Title II and

Title XVI disability claims. Each Disability Examiner is a professional staff member of one of 54 State Disability Determination Services (DDS) now extant. Disability determinations are made by the DDS's on behalf of the Secretary of the U.S. Department of Health, Education, and Welfare (HEW) under separate contractual agreements between the States and HEW.

Professional disability examiners in each of the 54 DDS's are required to make appropriate judgments as to the extent and effects of disability, capability to work, and vocational rehabilitation potential of all applicants. In the development processes of adjudicating each claim, Disability Examiners (DE's) are required to obtain, review, analyze, and evaluate medical, psychological and vocational evidence in reaching their decision of "disabled" or "not disabled".

Where the decision is "not disabled', as is the case in approximately 45% of the claims, the applicant has the right to appeal. Where the decision is appealed, the determination is subject to review by Federal Administrative Law Judges, Hearings Examiners, the Appeals Council, and the courts.

While it would be impossible to arrive at the exact average value of each claim, the fund impact of each determination, either expended by an allowance or saved by a denial, is estimated to be $23,000.

II. PROGRAM CHANGES DURING RECENT YEARS

In mid-1973 came the expansion of the program from Social Security (Title II) determinations to include Supplemental Security Income (SSI–Title XVI) determinations. This required a near doubling of the DDS staffs in both professional and clerical job slots. This required Disability Examiners to absorb new and complex procedures. Some of these changes were: new concepts of onset date, assessment of drug addiction or alcoholism, presumptive disability decisions based on sketchy or lay medical evidence, elimination of 100% review by the Bureau of Disability Insurance (BDI) and acceptance of in-house review and post-adjudicative review. Also, continuing disability review of SSI claims.

A great number of the more experienced DE's became Quality Assurance Specialists. This in-house "quality control" probably kept the programs and all concerned from getting into more trouble than was experienced in the form of overpayment, non-payment, multiple payments to the same payee, etc.

During 1974–75 litigations brought about several studies which were national in scope and required DE expertise to conduct. The due process and reconsideration interviews require personal contact with the claimant to assure complete and accurate documentation and to provide the claimant an awareness of the evidence obtained to document the claim and how the law applied to his particular claim.

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This evolution of the disability programs has placed the Disability Examiner in a role of having to know more and do more while trying to follow a proliferation of regulations, directives, policies, and "temporary-type" instructions.

During May and June of this year, an inventory of "temporary-type" *instructional* documents made by BDI. These included only non-manualized documents issued by BDI Central Office or Regional Offices for direction and guidance of the disability programs. The study sows that, on the average, the DDS was issued approximately 151 pieces of instruction outside of the basic manuals. The Central Office of BDI issued 105 temporary-type instruction for the use of the DDS's. This is not to imply that these instructions were not needed in the majority of instances because over one-half of these issuances are in some stage of being manualized. Further detail on this can be gleaned from a BDI draft of "Report on Inventory of Non-Manualized Instructional Material" dated July 10, 1975.

III. THE PLIGHT OF THE CLAIMANT

A wide majority of Title II applicants and/or SSI applicants are either actually disabled and can't work or they think they are disabled and can't work. This brings with it a state of mind which most of us have not experienced and can only imagine. Imagine then, if you will, the state of confusion and frustration which can and too often does build up in the mind of the applicant.

First, he goes to a Social Security District Office (DO) in his area of residence. He is interviewed by a Claims Representative and told to sign several documents. Later, he hears from a DE in the state capital who wants medical or other information. He may then get a letter or call to go see a certain doctor that he's never seen before. He does this. The consulting doctor examines him but usually tells him nothing. He goes home and waits—in some instances, up to three months. If disabled, he eventually gets a check. If not found disabled, he gets a form letter from BDI or HEW. These letters are signed by various individuals either by printed signature, rubber stamp, or an original signature on a specially composed letter. In any instance, the letter is not signed by the person who took the claim or the person who made the decision on the claim. The claimant at this point does not know who has done what with his claim and why.

I have presented the above general, but nevertheless, factual background information to provide a "rationale" which could be expanded into volumes of specifics which justify changes in policies and procedures and perhaps even in the law itself.

IV. THE POSITION OF NADE

The concerns among Disability Examiners about the areas I have touched on above have been mounting for about three years. These concerns have intensified since the advent of the Title XVI (SSI) programs. These concerns have been discussed, argued, and deliberated at NADE conferences big and small across the land until finally we (NADE) have reached a position which we now respectifully present in the form of two resolutions.

At the NRA annual conference in Las Vegas in October, 1974, the NADE assembly of delegates adopted the following resolution:

"Whereas it has come repeatedly to the attention of the Association and its Executive Board that there is considerable dissatisfaction with the present state/federal system of administering the SSA-SSI disability programs, both in terms of salary and other inequities to employees, and the difficulty of administration by multiple semi-independent agencies, and

"Whereas congressional interest is now being focused on the administration of these programs, and

"Whereas the manner in which such a transition would be made is of the greatest importance to members of our Association. Therefore be it

"*Resolved*, That should any action on the part of the NADE Board or any other party result in legislative action to effect federalization, of the state DDS', the NADE Executive Board and such NADE committees as shall be designated by the President shall approach the legislature and work actively to ensure that the rights of examiners and other state employees are protected. Be it further

"*Resolved*, That the following guarantees be sought:

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"Whereas the National Association of Disability Examiners is primarily interested in the professional adjudication of disability claims, the Executive Board declares that it believes the most efficient means of handling disability claims is its goal, and

"Whereas it is our belief that the most expeditious means of so doing is in protecting the rights of the skilled disability examiner, and

"Whereas the NADE Executive Board has agreed that federalization of the state disability determination services appears to be the best way to handle disability claims, and

"Whereas many basic questions remain unanswered. Therefore be it

"*Resolved*, That we direct the President of NADE to question the House Ways and Means Committee to resolve the issues raised in the Las Vegas Resolution on federalization which was passed by NADE. Be it further

"*Resolved*, That the House Ways and Means Committee be advised of our willingness to meet with them to discuss any legislation which would affect our profession in the event that it is found that federalization is the best means of serving the disability applicant."

Further action was taken by the Board as follows:

"To implement the policy of the NADE Executive Board as stated in the Resolution of April 26, 1975, such committee or committees as are necessary shall be appointed by the President of NADE to draft proposed legislation toward federalization and to work with the House Ways and Means Committee and such other committees of Congress as necessary to effect the sense and intent of said Resolution."

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A. *Equity in salaries.*—Currently salaries for initial claims examiners vary from over $13,500 in Alaska to less than $8,000 in West Virginia. Reconsideration specialists get around $14,000 in Texas and less than $8,000 in Oklahoma. A first-line supervisor is paid over $15,000 in New York and less than $9,000 in Puerto Rico.

B. *Retirement benefits.*—In the event of "federalization," the DE should be granted equitable portability of retirement credits from state to Civil Service status.

C. *Annual leave and sick leave.*—In the event of conversion to Civil Service, the DE should be granted equitable status under Civil Service including accrued leave in both categories.

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E. *Federal Compensation for Injury and Death.*—Equity for the DE should he be converted to Civil Service status.

F. *Severance Pay.*—Equity in the event of conversion to Civil Service status.

G. *Tenure.*—Tenure would be significant in the event of a RIF or abolishing job slots. For example, the DE with the greatest length of service, or tenure, would be retained if all other circumstances were equal.

H. *Transitional Option.*—In the event of federalization some DE's nearing retirement age would probably be found ineligible for conversion to Civil Service. Those individuals should be granted the option to remain in state employee status for up to five (5) years rather than being terminated upon effectuation of the law.

Thus, in as few pages as was possible, you have the position of NADE in this very important matter of service to the nations handicapped people. It seems only appropriate to conclude with the basic philosophy of NADE which is simply stated in preamble of our constitution:

We, invested with the responsibility for determining the extent of physical, emotional and mental impairment and the work limitation imposed therefrom upon persons claiming benefits emananting from contractual agreements or from gratuity, do unite under this Constitution to establish the National Association of Disability Examiners, a Division of National Rehabilitation Association, to develop the public trust in our integrity and judgment. To this end, we hereby affirm that we seek the equity of the applicant and the contractor and of the development of the full potential of the applicant through adequate rehabilitation services.

Mr. BURKE. Do you have questions, Mr. Archer?

Mr. ARCHER. I don't believe so, Mr. Chairman.

Mr. BURKE. The committee will take a short recess to vote, and then will come back.

[A brief recess was taken.]

Mr. BURKE. Mr. Lefler is next.

Is Mr. Lefler here?

Mr. LEFLER. Yes.

Mr. **Burke**. You are recognized, sir. Please identify yourself and proceed with your testimony.

STATEMENT OF JAMES L. LEFLER, ADMINISTRATOR, DISABILITY DETERMINATION SERVICES, SIOUX FALLS, S. DAK.

Mr. **Lefler**. I am Jim Lefler.

You have heard enough of the philosophical issues, pro and con, on federalization, and I would just like to punctuate that by saying that in spite of the differences that exist on that particular issue, that I don't know of anyone who takes issues with the doing of a good job in what we are assigned to do under the Social Security Act.

Dedication to the service is evident in every State in the country, and people divide on the issues when it comes to administrative practices and personnel practices, but they don't divide on the basic intent of the program of providing services for the handicapped.

So, having said that, Mr. Chairman, I would like to simply read a brief résumé of my statement that I did file with counsel, and I will try to be very brief.

On behalf of my colleagues, I simply want to say that we are in absolute agreement that the service appeals process is in need of your attention.

We also believe, however, that there is a better way to make decisions of entitlement in the social security disability insurance (SSI) programs, and we believe that correcting the problem at the more basic claims handling and decisionmaking level would have much to offer at the other end of the scale with the appeals process.

We do in fact believe that the Federal-State administrative arrangement that we have been working under since the inauguration of these programs is losing gradual control over it, and if left to continue in its present state, would result in problems equalling those that have precipitated welfare reform legislation in 1972, and have been a major concern of Congress and of the nation and will continue to be.

We believe that legislation federalizing the State EDS organization would be desirable, but must contain provisos for certain structures.

We believe the Federal-State structure needs new authority. We believe the DDS has the manpower and authority to restore eroded aid. We believe the States have a desire and ability to help guide changes in any such administrative rearrangement.

We believe that such change must not sacrifice loss of rights of benefits for individuals, and we firmly believe that such change must not sacrifice loss of rights for individuals, and we believe that total program costs would not be significantly higher under a purely federal system, and may in point of fact be lower, and certainly would be more manageable.

We believe that federalization would facilitate the work of the bureaus in the field. We believe the referral of handicapped people to rehabilitative agencies would be virtually unrestricted, and we agree with the concern expressed by some to the introduction of bills to improve the claims procedure.

We believe that people working in DDS's are entitled to the rights and benefits accorded to those who are their Federal counterparts.

I wish I knew how to better describe the apprehensions that I feel for the future of the program left in its present form.

I would not be so presumptious as to suggest that this committee explore the sensitive areas of why certain States respond in certain manners, but I would submit that there is a great deal more that should be learned if an in-depth analysis could be made about how states feel about their "no-name" positions between Federal and State administrations.

I believe at the present time there exists the greatest potential in the disability program for managing a large claims load in the most effective manner that has ever existed in the history of the program. This is true because of the strong nucleus of experienced management staff and a reservoir of newly trained executive and professional staffs in the States.

We are better able to accept the new changes now than we have ever been. However, it is our view that how this force is employed will ultimately determine the success of the program.

Many of us believe that now is the time to make those decisions to change the administrative relationships. We frankly believe that many of the proposals for alleviating the present problems are really adding to the complexities of the system and not attending to the basic problem of the lack of a centralized system.

I would like to punctuate that one point and qualify it by saying that I don't think, and none of us think, that we could have a 49.6 allowance rate in every State in the country. That is not the point at all. It is a matter of interpreting the regulations and operating philosophies that are a matter of concern, as well as the administrative and personnel practices of relationships that exist from State to State.

In spite of the excellent results seen in some of our BDS organizations, and there are results shown in many of our States, some vocational rehabilitation agencies have shown themselves to be incapable of administrative changes.

We believe that only through a single authority control can effective administration be assured, and we think the pubic is entited to that administration. If there is one point that I would like to make in my prepared statement that I have submitted, it would be that the Federal-State administrative concept is losing control over the program.

The advent of SSI has most assuredly added to the control problem, and control has been shifting from the Federal to the State side of the program for a number of years, and it has been what many construe as a national phenomenon as the State agencies have gone through the maturation process.

A continuation of this trend would result in an increasing number of States asserting greater and greater independence, and we would see this as a fragmenting process, and the interstate variation that we see today would become insignificant compared to those variations that we anticipate seeing in the future.

That concludes my statement, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF JAMES L. LEFLER, SIOUX FALLS, S. DAK.

DEAR MR. CHAIRMAN: Pursuant to procedures on participant presentations before your Committee, it is my pleasure to address the problems before the Committee in this letter and in person on October 3, 1975. I appreciate more than you know the privilege you have extended to me by permitting me to address the subject of the Social Security disability program. I feel as though my personal involvement and commitment of seventeen years in the administration of this program at the State level has largely been a satisfying experience. We cannot say that all social programs have served their intended purpose as well as we believe this one has, and many of my colleagues at both State and Federal levels in this work have been equally proud to have been a part of it. However, the reasons leading to the current public hearings are, for the most part, not ones of which we can be proud. We are concerned about such matters as the lengthy delays in appeals, the adverse kinds of Bureau of Hearings and Appeals (BHA) reversals that are being experienced, the widely varying rates from State to State in processing times, widely varying allow-deny ratios, widely varying personnel practices, and widely varying and ballooning administrative costs and the growing inability of State Disability Determination Services (DDS) agencies to cope with the size and dimensions of the problems. You are well aware of these problems and the only one I do not recall being cited in the Committee publications was on administrative costs. It is my understanding that these costs increased over 500 percent from Fiscal Year 1971 to Fiscal Year 1975 ($670,368 to an estimated $12,118,816). What started out as an exceptional partnership between Federal and State governments has taken a turn toward John Gardner's definition of "organizational dry rot" in government. Mr. Gardner said that organizations have life cycles and to survive they must have the capacity for self-renewal. We see little capacity for self-renewal in State DDS's.

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The delay in the process of the appeals procedure is certainly one of the concerns justifying the current review of the Social Security disability program. We do not pretend to be legalists in the National Association of Disability Examiners (NADE) but we are as sincere as anyone in our desire for National consistency in BHA decisions. If the appeal is to be nothing more than a subjective evaluation of a claimant based upon a personal interview and a layman's review of the medical evidence, then one might well question why the DDS is not, in fact, in a better position to make that decision than BHA. The DDS decision employs a medical-vocational team approach and most decisions have additional review by a quality specialist. A more proper purpose of the appeal in our mind would be more in the nature of a judicial review of the DDS decision on the record. We believe that a DDS examiner, after journeyman training, is as well equipped as a Hearings Examiner or Administrative Law Judge to render decisions of entitlement in this program.

The DDS's are presently relieving some of the pressure of the BHA problem through the acceptance of remand cases from multiple sources and perhaps this will prove to be a model for future programming and a further extension of DDS responsibilities. If so, it would resemble what has been occurring with increased frequency in recent years; that the DDS is becoming more than the "heart" of the disability program, it is also becoming the head and the extremities. We would think that it is alarming that a program of National intent is being administered by fifty-four (54) separate agencies of State government.

We are concerned over the legislative proposals currently pending in Congress: (1) We do not believe that "face-to-face contact" will have much impact on sheer numbers filing for hearings but we do believe the issues would be in better focus and that the remand procedure under "face-to-face" would permit better resolution of the issue when used. (2) We do not believe that a statutory provision requiring a decision in a specified number of days is wise without appropriate safeguards against abuse. (3) Reduction of the time for filing reconsideration and appeals actions would be preferred over the present system. (4) The expanded explanation of a denial in writing would require significantly more staff time with limited results as most denials would be based upon a standardized coding system with appropriate language rationale for each code. (5) We especially resent the implication that legislatively increasing the grade level of ALJ's would in any way help in alleviating the current problem. We do not deny that ALJ functions should be changed to more properly equate with the responsibilities of ALJ's in other branches of government, but a simple fact is that the State DDS employee is so far behind his peer group in Federal service that it is unconscionable to think about upgrading any remotely related element of the Social Security disability program until remedial action is taken to improve the career condition of State DDS staffs. I know of no greater affront to the professional State Agency (SA) disability examiner at this time than to reward another employee element of this program. The State DDS's have done a remarkably good job under conditions that apparently would not be tolerated by the BHA, but I do not know how long they will continue to do so under the dual standards of administration that seem to control this program today.

Another factor that is changing the DDS position at this time is the increased visibility by the public. We frequently find claimants who would prefer that their claims not be reviewed by their "friends and neighbors" in State government but would rather have them processed by a Federal agency for greater objectivity. This would be similar to one of the complaints heard in the BHA argument over the classification level of Hearings Examiners versus Administrative Law Judges. Career conditions vary considerably for examiners from State to State, thereby encouraging higher quality staff in some States versus others. John Q. Public is entitled to the service of the best examiner that the program can provide and certainly one who is no less qualified than an examiner in any State. In the few encounters we have had with claimants who have been upset with a decision or an action by our State agency, the frequent response is a threat to write "their Congressman"—not their State legislator, mind you—but their Congressman. Another quite common example of how the present administration confuses applicants: an applicant files a claim in a Federal office, a State agency writes to him for added documentation, then a denial is written and the letter which is sent notifying him of the denial comes from a Federal agency. I merely cite these as examples of how the public has never been fully able to understand why claims for Social Security disability are processed by a State government agency. When an applicant files for disability benefits, the contemplation of not working again is a traumatic experience and the least we can do should be an attempt to alleviate the trauma by prompt and considerate action, and not by adding confusion and delay to an already complex problem.

If there is one point that I wish to make today that stands out above all others (and there are other significant points to make), it is that the Federal-State administrative concept is losing control over the disability program. The advent of SSI has most assuredly added to the urgency of the control problem but it is not totally responsible for it. Control has been shifting from the Federal to the State side of the program for a number of years and has been what many construe as a natural phenomenon as the State agencies have gone through the maturation process. A continuation of this trend will begin to manifest itself through an increasing number of State agencies asserting greater and greater independence of the Federal influence and as this fragmentation occurs, the inter-State variations that we see today will, in our view, become insignificant compared to the variations of the future.

We, in the States, presently have the capacity to administer an effective program as designed by Congress and we have the potential to correct much of the problem existing in the BHA but the utilization of that potential depends upon what direction the program now turns. Does it turn in the direction of permitting State agencies to increase their independence with the accompanying increased variances that concern many today or does it turn in the direction of permitting greater influence at the Federal level with a total National effort being the goal and resulting in Federalization of DDS's? These are the questions that only the Congress can answer and that answer will be the cue that the States are waiting to hear so they may begin setting the pace of the program for the future. A reminder for us all should be that 99 percent of the State agencies endorsed the reasons for creating the Federal-State administrative concept in 1959 but in 1975, one-half of the agencies disagreed with the validity of those reasons as they presently apply. It is also significant to note that at the sub-administrative level of State agencies, namely the examiner level, the feeling is running exceedingly high for Federalization of the State agencies; over 90 percent in a recent poll conducted by NADE. The SA examiners have strong feelings about the variances in personnel administration from State to State and from State to Federal agencies, but their concerns are not limited to personnel matters as they also share management's concern about equitable program administration. The National Board of NADE has recently gone on record as favoring Federalization of DDS's and offering to assist in the drafting of legislation to accomplish that act. In virtually every analysis of Federal programs administered by State agencies, complaints are heard of erratic enforcement of those benefits that are subject to State manipulation. If we are able to learn from our experiences, then one would think that consideration should be given to assuring the public equal rights under the Social Security laws in every State. I must say at this point that employees of

DDS's are also a part of that public and are entitled to the same rights and benefits as Social Security district office personnel who are frequently working just across the street. The Social Security Disability Insurance program has been a good one but needs attention soon before "dry rot" begins. Federalization of DDS's would provide the infusion of new staff and new ideas that would assure a self-renewal.

I wish that I knew how to better describe the apprehension that I have for the future of this program if left in its present form. I would not be so presumptuous as to suggest that this Committee explore the sensitive areas of why States responded as they did to the staff questionnaire, however, I would submit that there is much to be learned if a more in-depth analysis could be made of how State agencies really feel about their no-name position between Federal and State administrative levels of government. I believe that there exists at the present time the greatest potential for managing a large claims load in the most efficient manner that has ever existed in the history of the disability program. This is true because of a strong nucleus of experienced management staff and a large reservoir of newly trained professional and technical staff in the State agencies. We are better able to accept new challenges now than we have ever been in our history. How this force is deployed will ultimately determine the success of the disability programs. Many of us believe that now is the time to bring the DDS's into the mainstream of Federal administration. We frankly believe that many of the proposals for alleviating an unfortunate situation are merely adding to the complexities of the system and not attending to the basic problem of a lack of a central system with its accompanying uniformity. In spite of the excellent results seen in a few DDS's, both the Bureau of Disability Insurance and the CSAVR have proven themselves incapable of effecting any really significant administrative changes in those DDS's where substantive changes have been found desirable. Only through single authority control can effective administration be assured and the public is entitled to nothing less.

Mr. BURKE. Mr. Pickle?

Mr. PICKLE. I would like to ask if you had heard my question on the preceding panel with respect to the possibility of reorganizing our whole appeals structure.

Mr. LEFLER. Yes, sir, I did. I think there are possibilities there. I have no specific recommendations in mind. I do intend to lean toward the closed record concept and would encourage refilings in State agencies, because it is my view that a claim moves more expeditiously in a State agency than it does in BHA. The State examiner has medical resources on a daily basis.

Mr. PICKLE. And that moves more quickly?

Mr. LEFLER. Yes, sir, it would result in more refillings, but it would avoid the waits we now have.

Mr. PICKLE. Do you have an opinion about whether you would upgrade the examiners, the hearing examiners, as a means to get additional personnel quickly?

Mr. LEFLER. I did not research that, but I have an opinion on it. My opinion would be that those people should be entitled to the same level as ALJ's are in the rest of the Federal service. I think it is an unconscionable thing to update one branch of the government at the expense of other agencies, which are the State agencies.

Mr. PICKLE. Mr. Chairman, I would also like to ask permission to welcome Mr. Phillips to our committee. I wasn't here, but in another conference, when he gave his testimony. I am reading it now. I would like to greet him officially.

Mr. BURKE. Yes. We are glad to have Mr. Phillips testify.

Do you place a lot of blame at the State level?

Mr. LEFLER. Yes; I think the State administration is very cumbersome and slow to react to the problems we have. I don't say that for my own State, I might add, because we do move claims quickly. There have been times when I have been in the State that we had problems and weren't able to move quickly, but we did incorporate the SSI program very expeditiously, if I may say so.

Mr. BURKE. Are there further questions?

The committee appreciates your appearance.

Mr. LEFLER. Thank you.

Mr. BURKE. Our next witness is Mr. William A. Vollmer. Please identify yourself for the record and proceed.

STATEMENT OF WILLIAM A. VOLLMER, CHIEF, DISABILITY DETERMINATION BUREAU, REHABILITATION SERVICES DIVISION, HELENA, MONT.

Mr. VOLLMER. Mr. Chairman and members of the committee, my name is William A. Vollmer. I am the Disability Determination Bureau Chief in the State of Montana.

I appear here as an independent witness. I have no national affiliation with any group. I have been assured that I speak for many of the independents that are not affiliated.

I am reminded of the notice on the corporation bulletin board which said: "The objective of all dedicated company employees should be to thoroughly analyze all situations, anticipate all problems prior to their occurrence, and have answers to those problems when called upon." However, when you are up to your neck in alligators, it is difficult to remember that your initial objective was to drain the swamp.

I hope we can all agree that our initial objective in the administration of the disability programs under social security is to serve the claimants in the best manner we know how. This includes the quality and timeliness of disability decisions, the protection of his rights, and economical administration.

Let me deviate from my prepared statement for a minute. I have crossed the country twice in the last 2 weeks. I have had occasion to speak with young people sitting on airplanes. They have a very concerted and very dedicated feeling that the trust funds under disability are not going to be there when they get ready to use them.

I believe we must address the economical administration part of this concept very closely, and I would like to have a recommendation reemphasized that the workings of the actuarial consultant be reviewed again in order to determine to try to see what can be done to alleviate the minds of those that believe that there is not going to be any social security trust funds when it comes time for them to apply for them.

Confusion exists in the minds of claimants from the very beginning of the application process in a district office. We have a super communication problem with the claimants and taxpayers we are serving. We have an even greater communication problem within the existing State-Federal structure of Bureau of Disability Insurance and the State DDS components.

If you don't believe me, check the Survey of State Disabiilty Agencies under the Social Security and SSI programs dated August 1, 1975. By federalizing DDS components and concentrating duties and responsibilities for disability development and adjudication, we would bridge many of the communication gaps. By closing these gaps, perhaps we would begin treating the cause of claimant dissatisfaction rather than treating the symptoms precipitated by the current system.

This series of hearings concerns primarily appeals procedure legislation. Some of the legislation appears on the surface as positive solutions. However, when examined in depth it appears only to melt the tip of the proverbial iceberg. At the BHA level we are discussing wide sweeping changes and procedures for less than 5 percent of all claimants applying for disability benefits.

The applicability of the Administrative Procedure Act to supplemental security income disability hearings has to be resolved in favor of the claimant. Place yourself in a claimant's position wherein you have filed concurrent disability claims, only now to have to pursue two separate hearings, one before a title XVI hearing examiner and the other before a title II administrative law judge.

You, as that claimant, should have no less rights than some powerful corporation like Northwest Airlines asking relief from some other regulatory agency, which permits your claim to be heard before an administrative law judge in accordance with the Administrative Procedure Act. By legislation you would be assisting in alleviating a very significant communications gap among claimants, as well as eliminating a time-consuming hardship in terms of administrative manpower. It is even questioned by some as to whether the Administrative Procedure Act applies if an initial decision has been rendered by a State agency.

If the magnitude and impact of the disability decision comes under the Administrative Procedure Act requiring review by an administrative law judge, then it follows that DDS personnel doing the lower level decisions should be federalized to insure equal pay for equal work. I believe it is essential in the consideration of this committee as to whether or not the APA applies. But whether it does apply or doesn't apply, it applies to both the title II and the title XVI disability programs, so that you remove the administrative nightmare of a claimant having to proceed through two separate entities as far as getting a final decision.

Whether it is all one way or all the other, I think it would be best for the claimant, and not split as it is now.

The informal remand procedure currently being carried out administratively is a positive development. The screening criteria seems to be effective. This represents again an additional workload for the DDS and serves further reasons for federalization.

The face-to-face interview at the reconsideration level would assist the claimant in having a better understanding as to why the claim was denied initially and without question would assist in closing evidential gaps. This would permit a better decision to be rendered at the reconsderation level. Likewise, the idea of the personal conference as part of the due process requirement is positive in perfecting the disability claim. Whether this process will reduce the number of appeals is unknown—I would anticipate an increase.

From the experience in our State and from the due process investigation now going on this is likely. In either of these situations it is essential that a disability specialist, an employee of socal security, should be discussing the claimant's social security or SSI disability claim.

The majority of all reconsideration decisions are completed in 90 days. However, I am opposed to time limits at either the reconsideration level or appeals level. There is no way we can put time limits in our requests to the medical community. This is an approach that would seriously disrupt our medical relationships. The other factor for an unusual delay in a claim is usually the lack of claimant's cooperation. Does this legislation imply that we will be rewarding a claimant because he has purposely delayed development on his claim?

If we are truly sincere in agreeing that our initial objectives include first, quality and timeliness of disability decision at whatever level; second, protection of individual claimant rights, whether in benefit status or not; and third, economical administration—then we must address the solution of insuring that communication gaps are closed by streamlining the total adjudication process by the congressional action of federalizing the State DDS components.

That concludes my statement. I do have an attachment that I would like to have become part of the record.

Mr. BURKE. Without objection, that has been made a part of the record.

[The prepared statement follows:]

STATEMENT OF WILLIAM A. VOLLMER, CHIEF, DISABILITY DETERMINATION BUREAU, STATE OF MONTANA

Thank you for granting me the privilege of testifying before your subcommittee on October 3, 1975.

My name is William A. Vollmer. I am the Bureau Chief of the Disability Determination Bureau for the State of Montana. I have held this position for 12 years.

I am reminded of the notice on the corporation bulletin board which said, "The objective of all dedicated company employees should be to thoroughly analyze all situations—anticipate all problems prior to their occurrence and have answers to those problems when called upon." However, when you are up to your neck in alligators, it is difficult to remind yourself that your initial objective was to drain the swamp.

I truly and sincerely hope we can all agree that our initial objective, in the administration of the disability programs under Social Security, is to serve the claimants in the best manner we know how. This includes: quality and timeliness of disability decision, protection of individual's rights and economical administration.

Confusion exists in the minds of claimants from the very beginning of the application process in a District Office. We have a super communication problem with the claimants and taxpayers we are serving. We have an even greater communication problem within the existing State-Federal structure of Bureau of Disability Insurance and the State DDS components. If you don't believe me, check the Survey of State Disability agencies under the Social Security and SSI programs dated August 1, 1975. By federalizing DDS components and concentrating duties and responsibilities for disability development and adjudication we would bridge many of the communication gaps. By closing these gaps, perhaps we would begin treating the cause of claimant disatisfaction rather than treating the symptoms precipitated by the current system.

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The applicability of the Administrative Procedures Act to Supplemental Security Income Disability hearings has to be resolved in favor of the claimant. Place yourself in a claimant's position wherein you have filed concurrent disability claims, only now to have to pursue two separate hearings, one before a Title XVI Hearing Examiner and the other before a Title II Administrative Law Judge. You, as that claimant, should have no less rights than some powerful corporation like Northwest Airlines asking relief from some other regulatory agency, which permits your claim to be heard before an Administration Law Judge in accordance with thhe Administrative Procedures Act. By legislation you would be assisting in alleviating a very significant communications gap among claimants, as well as eliminating a time consuming hardship in terms of administrative manpower. It is even questioned by some as to whether the Administrative Procedures Act applies if an initial decision has been rendered by a State Agency. If the magnitude and impact of the disability decision comes under the Administrative Procedures Act requiring review by an Administrative Law Judge, then it follows that DDS personnel doing the lower level decisions should be federalized to insure equal pay for equal work.

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The face to face interview at the reconsideration level, would assist the claimant in having a better understanding as to why the claim was denied initially and without question would assist in closing evidential gaps. This would permit a better decision to be rendered at the reconsideration level. Likewise, the idea of the personal conference as part of the "due process" requirement is positive in perfecting the disability claim. Whether this process will reduce the number of appeals is unknown—I would anticipate an increase. In either of these situations, it is essential that a disability specialist, an employee of Social Security should be discussing the claimant's Social Security or SSI disability claim.

The majority of all reconsideration decisions are completed in 90 days. However, I am opposed to time limits at either the Reconsideration level or Appeals level. There is no way we can put time limits in our requests to the medical community. This is an approach that would seriously disrupt our medical relationships. The other factor for an unusual delay in a claimant is usually the lack of claimant's cooperation. Does this legislation imply that we will be rewarding a claimant because he has purposely delayed development on his claim?

If we are truly sincere in agreeing that our initial objectives include:

(1) Quality and timeliness of disability decision at whatever level;

(2) Protection of individual claimant rights, whether in benefit status or not; and

(3) Economical Administration;

Then we must address the solution of insuring that communication gaps are closed by streamlining the total adjudication process by the Congressional action of federalizing the State DDS components.

Attachment.

ATTACHMENT

JUSTIFICATION FOR FEDERALIZATION OF STATE DDS' COMPONENTS

1. State agency DDS personnel administer a federal disability program, technical and adjudicative in scope. The original premise of utilizing state rehabilitation relationship with the medical community is obsolete. State Rehabilitative programs dealing with the medical community now utilize the relationship established by the Disability Determination Service (DDS) to administer Title II and Title XVI.

2. If federalized, the administrative conflict between the federal Social Security Disability program and the state administered Disability Determination programs would end, because only one agency would be supplying administrative direction. For example, even though federal authorization and requests for state personnel to attend training sessions, management meetings, etc., may have to be obtained, some states have prohibited out-of-state attendance at Social Security sponsored meetings. These meetings are very effective in improving the examiners' and the clericals' professional competence by exchange of technical data and other knowledge needed for proper effectuation of this federal program.

3. All Disability program information and instructions for Social Security Titles II and XVI are supplied by the Bureau of Disability Insurance, SSA. State DDS personnel are required by terms of the Federal-State contract to follow program direction; however, any issue of personnel classifications and salaries is considered solely a state responsibility. The Bureau of Disability Insurance cannot expect constant high quality program performance by disregarding wages of the people who do the job at the state level.

4. States rights are no longer an argument in view of the recent federalization of the adult categories of aged, blind, and disabled, which are now totally administered by the Social Security Administration as far as eligibility is concerned.

We question whether there is true federalization of SSI Disability Program under Title XVI, since under the current arrangement a State Agency continues to do the disability determination. This continues to lead to a wide discrepancy of allowance and denial rates among States.

5. Federal Bureau of Disability Insurance has directed the state Disability Determination Service (DDS) to assume many responsibilities formerly carried out by the Federal Social Security Offices. Some examples: (1) The State DDS' now do all medical development on Title II and XVI claims. (2) The State DDS' now do final decisions on 95% of the Title II and XII claims. (3) The State DDS' now do "due process" requirements on termination of disability claims. Additionally, the DDS now conducts the "due process" interview in selected states and this no doubt will become a national procedure. (4) The State DDS' now send denial notices directly to denied claimants. (5) The State DDS' are now responsible for providing determination data on all SSI decisions plus advising Social Security District office personnel when they make emergency advance payments on presumptive disability. (6) The State DDS' do final decisions on the Medically Needy, and Federal Fiscal Liability programs. (7) The State DDS' now are responsible for obtaining employment history and physical demands of prior work, skill, etc., by claimant-telephone contact. (8) In Title XVI, the State DDS' operate a federal teletype system. Allowance and denial data is input into the system which either triggers benefit checks or denial notices. In addition, the teletype system is used for case control which places great responsibility on the DDS' as far as accuracy is concerned. This system is tied in with all Social Security components.

6. Confusion exists in the minds of claimants, the medical community, and other involved persons and agencies because the disability claim is filed in a Federal Social Security Office. This claim is then sent to a DDS where a reviewing team determines the issue of disability after obtaining medical information from physicians and hospitals. In Montana, the State Social and Rehabilitation letterhead must be used for these requests. It is difficult to explain to the claimants the originating authority of these communications. Reports are thus misrouted, bill payments are delayed and the end result is confusion and unnecessary delay in claims processing. The claimants filing for disability are thus rendered an injustice due to the political marriage of the Social Security Disability Program with the various State agencies.

7. The procedures for purchase of equipment and rental space vary widely from state to state. For example, in Montana, to secure an office desk it is necessary to obtain SSA/BDI regional office approval; then the Division Administrator of Rehabilitation Services at the State level must give his approval. Next the SRS purchasing agent must start the mechanics rolling to get the equipment which then becomes the responsibility of the Division of Administration, Purchasing Division. This causes undue delay. Additionally, there are no uniform procedures for securing equipment among states. If State agencies were federalized, costs would be cut because of GSA purchasing power.

8. Most State Social and Rehabilitative administrators, above the DDS' level, lack knowledge of the Title II and Title XVI programs and respective requirements.

9. The indirect cost formula, which reimburses administrative costs of the disability insurance program, is entirely unrealistic in terms of the services provided by the administrative sections. For example, in Montana, $69,000 is alloted for administration, while one bookkeeper did all cost accounting for a salary of $7,200 in Fiscal Year, 1975.

A claimant in pursuit of disability benefits under title II must, himself, pay the doctor for providing evidence of record. On the other hand, over $12 million was taken from the Social Security Trust Fund nationally to reimburse state governments for "administrative costs". The accountability of the $12 million is questionable, as it is lost in a maze of state government uses. This run on Trust Fund money by state governments hardly seems fair to the worker who contributed to this fund from his monthly earnings. Viewed another way, federalization of the DDS program would eliminate arbitrary pressures from state officials interested in the program "for state gain".

10. Rehabilitation administrators have routinely given rehabilitation personnel first priority in areas like in-service training, attendance at national conferences,

etc. Even though federal monies have been made available for these items in State DDS budgets, disability personnel have not been considered at the same ratio as rehabilitative personnel. There is absolutely no resemblance to any uniform training programs in the 54 DDS' with the exception of the DEEP Program at the University of Tennessee which, of course, is not available to *all* the State DDS examiners.

11. State Merit systems have no knowledge of job entry requirements for disability programs administered by the Social Security Administration. They are familiar only with their own state programs. The Merit System therefore does not always provide a suitable pool of candidates for examiner and clerical positions. Neither does it provide, by its structure, a method of career advancement through work proficiency. The state imposed limitation often reduces the quality of candidates hired. This can very effectively stifle work incentive, as the compensation is the same, regardless of ability or productivity; thus another adverse factor is created, which can reduce the quality of claims processed.

12. There is lack of promotional opportunities for state agency personnel who are career oriented. There is no transferability between State DDS' components without losing annual and sick leave, retirement benefits, etc. In a federally administered program, there would be such transferability. This would reduce the number of trained people who leave the disability programs for better jobs in other fields.

13. Each disability decision represents an average benefit cost of $27,000, which is drawn by a disabled beneficiary from disability insurance trust funds or federal general funds. The decisions made at the state level draw on federal funds, yet there is considerable variance in decisions across the U.S.A. because of different training programs, different hiring practices at the state level and lack of uniformity in state administrative practices.

14. State Vocational Rehabilitation agencies had tied compensation for disability examiners with rehabilitative counselors, who are in two distinctly different fields of work. This also applies to the clerical staff. The clerical work of the Disability Determination Services is in a distinctly different field from that of a general clerical. The professional and clerical staff of the State Disability Service must have knowledge of the phases and aspects of each other's work to effectively and efficiently process the disability claims. The Federal GS scale, commensurate with the complexity of the DDS' work, should reduce staff turnover. As an example, in Montana, attempts to promote DDS personnel because of increased job duties and responsibilities have been routinely blocked by the State SRC hierarchy.

15. According to the Committee Staff Report on the Disability Insurance Program, July, 1974, there was a wide discrepancy in compensation at the federal and state level. For example, a disability examiner in the Bureau of Disability Insurance, with no prior experience, enters on duty as a GS–11 ($14,671 per year). An examiner entering on duty in Montana starts at $7,560 per year. Both are trained on the job and require the same type of educational qualifications.

16. For the four years prior to 1975, DDS' employees were limited to less than a 5 percent increase annually, with no provision for merit or increment increases. Currently, any potential salary increase for DDS' employees must be tied to a like increase for all State employees without regard to increased job duties or work loads. Our counterparts in the Social Security Administration have enjoyed an annual cost of living increase and regular increments at the same time that many of their functions were transferred to the State DDS components.

17. Nationally, all DDS' personnel (clerical and professional) at the state level have no effective redress for their financial and administrative problems because of the substrata occupied by the DDS in the state administrative structure.

18. "Due process" and select reconsideration interview procedures now require that a DDS examiner conduct a face-to-face interview with a claimant. Since the DDS examiner is discussing and representing the federal program, he should be a federal employee.

19. Various state welfare systems are exerting considerable pressure on their corresponding DDS' to liberalize the disability criteria used by the DDS'. Such liberalization would permit more people to qualify for the SSI and SSA disability programs (federal funds), thereby removing them from State funded programs such as General Assistance AFDC, etc. In one particular instance, a DDS administrator was advised that if he did not liberalize the Social Security

Disability criteria that he could be replaced by someone who would liberalize the criteria.

20. Doctors, when contacted for evidence of record or for consultative exams, are well aware of the program for which they are providing medical evidence. The argument that the medical community would not cooperate with DDS', if federalized, is without merit. We anticipate no unusual problems with the medical community if State DDS' were federalized.

21. In some DDS components, the DDS Administrator has been restrained in his ability to "tell it like it is" because of fear of reprisal by State hierarchy. Therefore, freedom to speak out on program and administrative issues is compromised.

22. If state rehabilitation administrators consider certain Social Security instructions contrary to their stance, then their view is controlling on the DDS employee, who is, after all, a state employee. As an example, DIL II-59 provided for an "informal Remand procedure to alleviate the BHA backlog. Some State Rehabilitation Administrators, however, refused to implement this instruction. This is in clear violation of the Federal-State Agreement. Yet, their stance was controlling over their State DDS operation.

23. Under the present structure the DDS' has no control over what information is given them by the DO, often resulting in inadequate and delayed information needed for expedient and valid adjudication. The DO responsibilities are so fragmented that the Disability Program suffers as a result. If federalized, the DDS' could handle the claim from beginning to end including SGA decisions, P.D. determination, notification of decisions, denial and termination hearings and any other issue involving disability.

The logistics of administering the complex Social Security program require that a DDS exist in each state as close to the public as possible. For the above stated reasons, a more effective and dynamic administration of this program will occur by entirely eliminating state controlled administration of the DDS'.

Mr. Burke. Mr. Pickle?

Mr. Pickle. Mr. Chairman, at the beginning of your satement, you said you assured these young people that there was money in the fund, and they did not run the chance of losing their benefits?

Mr. Vollmer. I said it is a concern that is shared by many, and from the testimony from some of the actuarial results that I have read, by Mr. Meyers, I am inclined to have some concerns myself. The disability and health insurance——

Mr. Pickle. Perhaps I misunderstood you. I thought you were assuring them that there was money there, and that they ought not to worry about it.

Mr. Vollmer. That is a concern I felt in that particular instance.

Mr. Pickle. I want you to assure me, then. How do you know that?

Mr. Vollmer. I don't know that it will be there, Mr. Pickle. It is a concern that I have.

Mr. Pickle. Well, we all have, and I think perhaps it is correct we are not going to run out immediately, but our disability is going to be out of funds in 1978, and others by 1980. Something has to be done, so we can't be complacent with these funds.

Mr. Vollmer. That is true. I fully agree with your conclusion.

Mr. Pickle. On a face-to-face interview at the reconsideration level, would you combine that approach with a telephone face to face? Is there such a thing as a telephone face to face?

Mr. Vollmer. It may be a mechanical necessity that we do that in Montana. From one corner of the State is roughly 875 miles, which is the same distance between Washington and Chicago, and it is difficult to cover the whole State with the staff we have. It may be in some instances the only vehicle we would have to communicate is the telephone.

Mr. PICKLE. Since you didn't mention it, I assume that would be a last-resort approach. Would it?

Mr. VOLLMER. I conclude in my opinion that a face-to-face interview is a positive development. I am not sure I can predict that it will cut down the appeals process. From our experience in the due process study, and it is a very minimal number, it has a tendency to increase appeal. Once a person is in benefit status and he loses them——

Mr. PICKLE. One of our witnesses today said if you adopted the face-to-face approach, that that would add another 30 days of additional time.

I would think, not being in the program directly, that overall the face-to-face interview would work to shorten the time. As you talk to a person, you somewhat recognize him as an individual. What is the objective overall, to save some time, or is it just to make the claimant feel better temporarily?

Mr. VOLLMER. I suppose we all have varying opinions on that. I having a feeling that the claimants right now have a feeling that they are getting shortchanged because they don't have a good discription of why they were denied, and they know from the welfare rights organizations, they know from the publicity that is being generated by various documents, and I might suggest that the Colorado Lawyer in May 1975, there was an article in there by Mr. Smith, which should be reviewed, and he was an administrative law judge at the time he wrote it. He encouraged people to seek out people who had been denied in an effort to try to assist them to get benefits.

The same article also pointed out that this is a very lucrative area from a lawyer's standpoint, that there are various ways to increase the amount of information presentable at a hearing, which was to ask for a delay in the hearing date, which would likewise increase the amount of retroactive benefit, which would, in turn, increase the amount that the lawyer might be able to take home.

I think it is a very pointed article in that regard. People do know that if they appeal long enough, they are eventually going to be allowed. They have that philosophy.

Mr. PICKLE. In that connection then my last question would be with respect to the time limit which you have posed. We do have programs now in the Government where decisions are required to be made within a certain time, and apparently we have been able to operate them without violation of due process proceedings, or in violation of their civil rights.

Now, you take the position very strongly that you do not think you can set a time limit on these cases, primarily for medical reasons.

Now, you make your statement that you said, "Does this legislation imply that we will be rewarding a claimant because he has purposely delayed development on his claim?" Of course, that could work the other way around, couldn't it?

Mr. VOLLMER. Yes, it could.

Mr. PICKLE. Couldn't he receive an adverse decision by not giving medical evidence? So it could work both ways.

What about the proposition that people have recommended here today, that we do have a definite time, 90 days on appeal, and a decision must be made within that time, with an added proviso that there might be another additional 30 days if the record hadn't been complete for medical reasons, or some unusual extension?

Now, would that be agreeable to you? In other words, if you had that set time, plus another 30 days, how long would you allow that to go on? A year and a half?

Mr. VOLLMER. In my State there are a very small percentage that goes over 90 days. Those that do go over 90 days, usually it is a mechanical problem in the development of the claim.

My concern primarily is in the area of cost. If the person goes into benefit status within 90 or 120 days on an appeal, I think that the trust fund is going to get further depleted faster than what it is right now. Primarily I don't know what the cost projections would be. Somebody said $17 million this morning. I anticipate that that is an estimate that is far short of the costs of this procedure.

Mr. PICKLE. Thank you, Mr. Chairman.

Mr. BURKE. With reference to your statement with respect to your concern about the trust funds, did you know that this committee has been holding hearings and is investigating the financing of the trust funds? You know that is going on at the present time?

Mr. VOLLMER. Yes.

Mr. BURKE. We are awaiting word from the administration on recommendations on how the trust fund can be stabilized. There is a new Secretary of Health, Education, and Welfare, Secretary Mathews, and I met with Secretary Mathews recently, and we are hoping that he will come forward with administration recommendations.

You see, the executive branch proposes and then we dispose, and we are waiting for them to propose.

Mr. VOLLMER. I am thankful that it is being looked at very closely.

Mr. BURKE. We are looking at it, and I don't think there will be any danger of the trust fund going into a deficit to the extent that the beneficiaries won't receive their money. I don't think that there is a public official in the Federal Government that would dare take the responsibility for allowing that to happen.

So if you are talking to these young people, tell them at least during this 2 years, up until 1977, that we do face a $15 billion deficit in 1977, but there will be enacted into law a provision to make sure that the fund is stabilized.

Social security isn't going to be destroyed, irrespective of the wild claims that some people are making. It takes care of an awful lot of problems. I don't know of any insurance policy that covers total disability the way social security does. I don't know of any private insurance policy that covers the support of surviving children up until they are age 22, these are things that we have to keep in mind, and I doubt very much if anybody in the U.S. Congress or the executive branch of this Government is going to allow social security to be destroyed.

Mr. VOLLMER. I appreciate your comments, Mr. Chairman. I would ask that you also keep in mind that these I share with you as far as the input that I am receiving. Young people are paying their fair share for this, and they are very concerned about what the share is going to be in 20 years.

Mr. BURKE. That is right.

Mr. VOLLMER. Thank you.

Mr. BURKE. Thank you very much.

Did you have any questions, Mr. Steiger?

Mr. STEIGER. I will pass, Mr. Chairman. Thank you.

Mr. BURKE. Thank you.

Our last witness today is a gentleman well known to all of us, Mr. James Gashel, chief of the Washington Office of the National Federation of the Blind. We welcome you here, Mr. Gashel, because we know of the work your organization has done throughout the years.

STATEMENT OF JAMES GASHEL, CHIEF, WASHINGTON OFFICE, NATIONAL FEDERATION OF THE BLIND

Mr. GASHEL. Thank you, Mr. Chairman. I am chief of the Washington Office of the National Federation of the Blind. I come to you today representing the largest organization of blind persons.

With your permission I will proceed to summarize my statement.

Mr. BURKE. Yes. Thank you. Your entire statement will appear in the record without objection.

Mr. GASHEL. Thank you, Mr. Chairman.

We, too, are very much concerned with the tremendous delays and backlogs in the hearings and appeal process, because the members of the National Federation of the Blind very often have to depend heavily on receipt of benefits and the smooth operation of these social security programs, the employment market being what it is, and the attitude of the public about blindness sometimes being what they are.

Your concern, Mr. Chairman, as you expressed it so eloquently in the first session of these hearings, is indeed our concern in the most direct sense.

Now, in Mr. Cardwell's statement he indicated that the administration is approaching the problem from essentially two angles. The first one of these is to increase the productivity of the Bureau of Hearings and Appeals through additional staff and through providing them with necessary modern office equipment. We certainly salute those initiatives, and we recognize that one way to improve the process or the productivity of that process is to add additional staff and to modernize.

Second, the approaches to influence the number of appeals and measures to accomplish this have been discussed quite a bit today. They include the informal remand process, they include face-to-face interviews, they include reducing the period of time during which one may apply for a hearing.

While we salute the administration's initiatives, we are concerned that the efforts not be made toward dissuading claimants from filing appeals if they wish to do so.

We in this connection have no problem whatsoever with the process of informal remand or the screening of pending disability appeals.

With respect to the face-to-face interview, while we support the basic concept, we do have some apprehensions which we would like to express for the record. Almost everywhere in the country right now there is only one unit of the DDS. In adopting the face-to-face interview plan we must, of course, take this into account, and we must acquire methods of putting the disability examiners in close proximity with the claimants which they have to serve.

If we don't do this, we predict even greater delays. Consider this: In the State of Texas the DDS is located in Austin. Our claimant for purposes of this examination is located in Pringle up in the panhandle, approximately 700 miles away. She files a disability claim and is denied. She requests reconsideration. Something along the line she is notified to drop by the DDS for a face-to-face interview.

Distances are great and transportation is not always convenient or available, and when it is available it is costly. And then, too, we have to consider the physical condition of the claimant. She may not be able to make the trip, even if the distance is a short one. It may be months before the trip can be arranged.

Then, of course, we have to consider that the DDS staff must coordinate its schedules with those of a number of claimants filing for reconsideration.

In reality the delays which we sought to avoid may not be avoided at all unless we are careful about it. Along with some of the other witnesses we are somewhat concerned about what might happen to the objectivity of the process if the face-to-face interview plan is adopted.

In a high percentage of cases the claimants are not themselves knowledgeable about the factors which went into the decisionmaking process in their case, and they are not knowledgeable about the provisions of the law and the regulations. This would be indicated, incidentally, by the increased use of attorneys during the appeals process.

Now, this being the case, assuming we have a full case development at the initial filing level, and this is the point which we will discuss later, we feel that the disability examiner should be in a position to make an objective determination on the matter, and we feel that this should be done under the present system.

Now, we also think that in the face-to-face interview situation the disability examiner, presuming his original decision to be the correct one, might have a tendency to try to defend that position and, of course, he is well equipped to do so.

Our claimant, on the other hand, is not always well equipped to do so, not understanding or being an expert in the law and the regulations. Therefore, the claimant may become overwhelmed, become confused, and the result may be some less appeals, as has been predicted, but in the process we must be careful that justice does not suffer.

This leads to the question of reducing the time allowed for filing for appeals from 6 months to 60 days. We favor the 6 months as provided in the law. It is argued that 6 months' time is excessive for one to consider whether or not to file. Statistics gathered, however, would indicate that this is not so, since most claimants now file within approximately a 60-day time period.

In any event, we don't believe that the time length for claimants to consider filing is a factor. In fact, we would predict some increase in the claims filed since claimants will feel pressed, and will not have time to seek study and consultation. Such study and consultation may direct a claimant toward not filing.

Experience tells us that we must guard against this attempt to limit the time periods. Earlier this year there were those that really were suggesting to reduce the 30-day time periods in the SSI program from 30 days to 10 days. We would certainly oppose such a program, and were pleased that that has not been implemented.

Moving on, Mr. Chairman, we do favor the plan which would include the SSI hearing examiners under the APA. It is our understanding that this was the intent of the committee in the first place, and we support clarifying legislation as developed by the Public Assistance Subcommittee.

We think this is the only way that true justice can be done to the recipients in the SSI program. Inevitably, as has been pointed out so many times here today, what occurs during the period of case development, impact heavily on the workload at the level of reconsiderations, hearings and appeals, and so it is to this latter consideration that we would like to turn our attention right now.

Some have suggested that poor case development is, in fact, the major factor in causing a high rate of appeals and the 50-percent reversal rate. My experience in assisting claimants tends to hear this out. Entirely too often applicants are provided with incomplete, correct, or conflicting information by SSA personnel. They are all aware, certainly, also, of the unreasonable delays in time of filing.

Mr. Burke. Would you hold up a moment?

All right, go ahead.

Mr. Gashel. These problems of information gathering and information giving out and these problems of delays come together to create substantial frustration for a person who is growing increasingly dependent upon a favorable decision in his case.

During this extended period of time also an attempt to learn the status of one's claim is rarely, if ever, fruitful. Who has not seen the bitterness and frustration which grips those for whom the social security system has failed to work properly?

Even if the denial of benefits is, in fact, the correct decision under all circumstances considered, the claimant has an overwhelming tendency to fight back at the system.

The following four recommendations, therefore, we would like to make, which we think will correct some of these problems.

First, improve training programs for SSI personnel. I often find claims representatives who operate under the impression that, for example, the substantial gainful activities in the disability program is the same as the earnings limitation in the retirement program.

It is not, as you know. But if this misinformation is given to a beneficiary, and then that beneficiary exceeds his allowed earnings limits, his benefits may be adjusted or, in fact, they may be terminated, which, of course, may prompt an appeal, an appeal which could have been avoided if correct information had been given by the SSA representative in the first place.

Second, designation of specialized personnel to handle certain types of claim, particularly those filed by blind persons. These specialized personnel should be available in the larger district offices of Social Security, and we think existing staff could be utilized if special training were provided. Such a person should substantially reduce errors and should provide blind persons with greater information about the law and the provisions as they apply to the particular situation.

The SSA claims representative who believes now that the blind are required to meet both the recency of work tests and the length of work tests under the disability insurance law is rendering erroneous decisions. He is creating appeals which could be avoided under this plan.

Third, we recommend implementation of a system whereby claimants are provided with regular status reports on their claims. This would substantially reduce the applicant's frustration with not knowing where he stands. It would also provide a better understanding of the process of determining disability, and we believe it would result in less appeals.

We envision here just briefly a plan whereby status notices would be sent to claimants every 90 days, and preferably perhaps every 60 days.

Fourth and finally, we recommend a change in the law which respect to the eligibility of blind persons. Our recommendation, Mr. Chairman, is contained in your bill, H.R. 281, which would accomplish this.

By adopting H.R. 281 many of the complexities of the law, of the cumbersome system which must now be administered, would be removed. It would maintain the work requirement, but would also remove the substantial gainful activities, and this complexity creates many problems currently.

We do hope—this is certainly not the time to discuss all the merits of that legislation—but we do hope the subcommittee will have an early opportunity to do that.

Mr. Chairman, finally, I just want to conclude by expressing our deep appreciation to you and to the members of the subcommittee for your efforts in clearing up these unconscionable delays in the hearings and appeals process. We urge that careful scrutiny be given really to all phases of the social security programs, because as we and others have pointed out, we are dealing with a complex network of interrelationships here. The quality of the operation and the decisionmaking at one level inevitably impact at other points as well.

We feel the alternatives we have suggested would operate to reduce the high rate of appeals, and would also operate to reduce the high rate of reversals. This, in our opinion, would make for a more cost-effective social security system, and obviously would redound to the benefit of the claimants whom we all seek to serve through social security.

Mr. Chairman, thank you very much.

[The prepared statement follows:]

STATEMENT OF JAMES GASHEL, CHIEF, WASHINGTON OFFICE NATIONAL FEDERATION OF THE BLIND

Good afternoon, Mr. Chairman, and members of the Subcommittee. My name is James Gashel. I am Chief of the Washington Office of the National Federation of the Blind. My address is Suite 212, Dupont Circle Building, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036.

The National Federation of the Blind is a nationwide organization of blind people. We have come together to provide a vehicle through which the blind may speak with a collective voice. Our membership is greater than fifty thousand, and we have a state affiliate and local chapters in each and every state in the United States. As we often put it, the National Federation of the Blind is not an organization speaking for the blind, it is the blind speaking for themselves.

In this capacity, Mr. Chairman, we come before the Subcommittee on Social Security today. We commend the Subcomittee for its initiatives in tackling the tremendous problems now facing Social Security. The solutions, as you well know, are not easy to arrive at, but as you also are aware, they must be found.

One of the troublesome areas of priority concern to the Subcommittee and to us as well is the matter of delay and backlog in hearings and appeals on decisions rendered in Social Security cases. Mr. Chairman, you and other members of this Subcommittee have repeatedly probed and queried the various witnesses in an effort to determine the fundamental causes for these delays. Your concern, as you expressed so eloquently during the first session of these hearings, has been to speed up the adjudication of these claims. Your concern has been focused on the human needs which these programs are intended to meet. We, as blind people, appreciate that concern, Mr. Chairman, since many of us must depend on the smooth functioning of the Social Security system to put bread on the table and to fulfill our other basic needs. Your concern, in other words, is our concern in the most direct sense.

Various theories have been advanced relative to the causes for the breakdown in efficiency of the appeals process. I wish to comment on some of those and advance a few others, and then I wish to propose some possible solutions.

In his statement before the Subcommittee, Mr. Cardwell (Social Security Commissioner) explained that the administration is attempting to approach the problem of delays from two directions. The first of these is to increase the productivity of the hearings officers and staff in the Bureau of Hearings and Appeals. We approve and endorse the administration's initiatives in this regard. Obviously, one way to reduce the backlog and to shorten processing time is to increase the staff of administrative law judges and to provide them with adequate support personnel and equipment.

The second approach outlined is to influence the number of appeals being made. Measures to accomplish this include screening of pending disability appeals, informal remand process, face-to-face interviews with decision makers, and reducing the period in which a hearing may be requested.

While we salute the administration for its initiatives to improve the prehearing process, we are concerned that these efforts not be directed toward dissuading claimants from exercising their right to appeal. In this connection, we see no problem with screening of pending disability appeals and with the informal remand process. With respect to the adoption with the face-to-face interview plan, we do have some apprehensions. In most parts of the country, only one central office exists for the Disability Determination Service (DDS). These programs have deliberately not been organized to be readily accessible to individual claimants. If we are now to adopt a plan which reverses this tradition, we must consider the fact that the DDS must be able to reach out to the individuals it serves. If this is not done, we predict even greater delays and frustrations.

Consider this situation which might likely occur. In the state of Texas, for example, the Disability Determination Service is located in Austin, the state capital. Our claimant in this instance resides in Pringle—up in the panhandle some seven hundred miles away. She files a claim for disability insurance and is denied. She requests reconsideration. Somewhere in the process she is notified to come by the Disability Determination Service for a face-to-face interview. The distances are great; transportation not always available or convenient; when available, it is costly; and we must consider too the physical condition of the claimant—she may not be able to travel even a short distance. It may be months until the trip can be arranged, if it can be arranged at all. Enter into the mix the inevitable problems encountered when the Disability Determination staff must arrange its schedule to accommodate interviews with other claimants and it becomes obvious that the time and delay we sought to avoid has not been avoided at all.

Some have suggested decentralizing the Disability Determination Services but this solution would still not be entirely satisfactory since additional bureaucracy, paperwork, and red tape would be required of the state agency. In our judgment the centralized plan of Disability Determinations is probably the most efficient approach.

In the recent staff study of the Disability Determination process the view was expressed that face-to-face interviews by disability examiners might compromise objectivity. This is a matter of some concern to us as well. In a high percentage of cases, claimants, themselves, are relatively uninformed as to the provisions of the law and/or the regulations. They are often not knowledgable enough to defend their claims for benefits. The increased use of attorneys in the appeals is evidence enough for this conclusion. The complexities of the law have made it often unwise for the claimant to serve as his or her own representative at such hearings or appeals.

With this in mind, we are concerned that the face-to-face interviews not have the effect of dissuading claimants from exercising their appeals rights. Assuming a thorough case development by the claims representative in the Social Security district office (a point which we will discuss later) the disability examiner in the Disability Determination Service is (or should be) in a position to render an impartial decision. Under the circumstances, the examiner, presuming his decisions to be the correct one, is quite likely to want to defend it, and he is well equipped to do so. At the same time, the claimant is often not as knowledgable. Faced with the arguments arrayed against him, he is likely to become overwhelmed and confused. The result may, in fact, be less appeals, but there may also be some question as to the objectivity of the process. In our judgment, those filing for benefits must understand that they have the right to an appeal through what is essentially a judicial process, and nothing must be done which would have the effect of discouraging the exercise of this right.

This brings me to another of the administration proposals—that is, reducing the period allowed a claimant to file for reconsideration and/or a hearing from six months to sixty days. It is argued that such a reduction in time will result in a corresponding reduction in the number of requests for reconsideration and/or hearings. We believe that this is the wrong approach, and we favor continuing the present time periods.

It is argued that the six months allowed permits one an excessive amount of time to decide whether or not to file. On the contrary, we suggest that this period enables the claimant to seek part advice—advice which may often affirm the original decision. If the time period is reduced some may be dissuaded from filing at all, but others may file hastily, and an excess of frivolous claims might be the result.

Of course, the objective sought is to reduce the number of requests. While this may be desirable, it is not desirable to discourage those who wish to appeal. Again, the law and the regulations are complex. There are many varying interpretations, and nothing should impede a claimant from an effort to study his or her position and to seek the judgments of more knowledgable persons.

Experience tells us that we must guard against the desire to limit the time allowed for filing for reconsideration and a hearing. Earlier this year some were proposing to reduce the time periods in the SSI program from thirty days to ten days. We are pleased that this has not been done, and we would strongly oppose any such plan. Unquestionally, one way to reduce hearings requests is to find methods of discouraging them, but in the process it is the people who suffer and justice is not well served.

The argument that time reductions would be a substantial advantage in reducing the number of requests for reconsideration and/or hearings is not supported by the statistics. This evidence gathered would indicate that a majority of claimants now file within or very close to, a sixty day time period after notice of denial. This being the case, no substantial advantage would be gained by limiting the time for those who take somewhat longer.

With respect to the applicability of the Administrative Procedure Act (APA) to SSI cases, we wholeheartedly endorse the administration position that SSI hearings examiners should be appointed and should function under the APA. This view is consistent with what we understand to be the Ways and Means Committee intent, and we urge adoption of H.R. 8911 which will serve to clarify the issue. In our opinion this is the only just solution.

During this series of hearings the Subcommittee has heard from many witnesses with many theories as to the causes for the backlog .Much needed attention has been given to the hearings process. Inevitably, the process, itself, is affected by what occurs from the point of the initial filing of a claim to the initial denial of that claim. The completeness of the information gathered and the quality of the decisions rendered during this phase must not be ignored. Some have suggested that poor case development is perhaps the most significant single factor resulting in the high rate of appeals and the fifty percent reversal rate.

Our experience in assisting claimants lends credibility to this analysis. Generally speaking, I would observe that in entirely too many instances applicants are provided with incorrect, incomplete, and/or conflicting information. You are already well aware that there are often unreasonable and unexplained delays in the initial decision process on disability claims. Together these problems of gathering and furnishing information along with the delays create substantial frustration for a person who is growing increasingly dependent on a favorable decision. During this extended period (sometimes now exceeding one year) attempts to learn the status of one's claim are rarely, if ever, fruitful. When the decision is finally rendered, and the claimant notified, the tendency not to accept a negative finding is at a peak, thus, filing for reconsideration, hearings, and appeals.

Mr. Chairman, all of us have seen the bitterness and despair which grips those who feel aggrieved by the inefficiencies of the Social Security system. Even if the denial of benefits is correct and justified in the circumstances, there is a tendency to fight back at what people perceive to be an inefficient and unfair system. We do think that certain measures can be taken to reduce this mounting credibility problem, and if they are, we predict some diminishing in the number of requests for hearings and appeals.

First, improved training programs for district office staff and other personnel must be instituted. I often find claims representatives who operate under the impression that the test for "substantial gainful acivity" is the same as the "retirement test." It is not. Such misinformation might cause a bordeline beneficiary to exceed the allowed level of SGA, resulting in a benefit termination or adjustment and prompting an appeal from the beneficiary.

Second, designation of special personnel to handle special types of cases should improve information gathering and decision making at the district office. Specifically we recommend employment of specialized personnel to assist blind applicants. This should be done in the larger district offices and should not require any additional staff since existing personnel could be utilized. Such a plan should eliminate errors and provide blind claimants wtih a greater understanding of the law as it applies to their particular situation. The result: Reduced hearings:

The claims representative who now believes that the blind are required to meet both the test of "recency of work" and that of "length of work" (and I know some who do, or did) is rendering erroneous decisions and causing appeals which could have been avoided. At its 1975 National Convention, the National Federation of the Blind adopted a resolution concerning this, and a copy of that resolution is attached herewith.

Third, we recommend implementation of a system which would provide claimants with regular reports as to the status of their claims. This would substantially reduce the applicant's frustration with not knowing what is happening in the claims process, and it would also provide the applicant with on-going information about the Social Security program and his case in particular. The end result, we feel, will be less frustration with the system and a greater willingness to believe that a fair shake has been given. We recommend that regular and periodic notices be sent to all disability claimants at least every ninety days, commencing at the time of filing of the initial claim and continuing until the decision has been made. Preferably such status notices could be mailed every sixty days. We are convinced that such a system would create greater satisfaction, and we urge its serious consideration.

Fourth, we recommend a change in the law with respect to the eligibility of blind persons. Mr. Chairman, you have introduced H.R. 281 which would accomplish this objective. You are joined in this bill by five other members of the Subcommittee. Your bill would remove the complexities inherent in the substantial gainful activity test by removing this limitation. It would, of course, maintain the work requirement, but hereto the complexities of the present work requirement would be removed. In doing these things, H.R. 281 would replace the cumbersome system which we now have with an easier one to administer. This is not the time to discuss all of the merits of this legislation. We hope, and believe, that we will have a full opportunity to do this at an early date. The point here is that adoption of H.R. 281 would result in a decline in the appeals rate since many appeals are generated because of the complexities now in the law—complexities which your bill would remove.

Mr. Chairman, I want to conclude by expressing our appreciation for the Subcommittee's efforts to correct the injustices done by these extended delays in the Social Security appeals process. We believe that careful scrutiny must be given to all phases of the current Social Security system since we are dealing with a complex set of interrelationships. Obviously the quality and effectiveness of the operation at one level will inevitably impact at other points. With this in mind, we have suggested certain plans which should operate to reduce both the number of appeals and the high reversal rate. This, in our opinion, would make for a more cost-effective and efficient system, and would redound to the advantage of the people who are to be served. We are confident that you will agree.

Resolution 75-27

Whereas, the Supplemental Security Income Program was established on January 1, 1974, and placed under the auspices of the Social Security Administration; and

Whereas, the total job assignment of the Service and Claims Representatives is so complex that they cannot hope to become expert in both the Supplemental Security Income and the Social Security Regulations of the Social Security Administration; and

Whereas, when dealing with the complexities inherent in blindness, staff members should not only demonstrate their knowledge of the law, but also their understanding of the proper philosophy and needs of the blind; and

Whereas, up to this time, the personnel involved in the disbursement of Supplemental Security Income payments have demonstrated their incapacity to appreciate the problems inherent in blindness; and

Whereas, when programs for the blind are placed under specialists in tune with the needs of the blind, such programs provide more adequate service to the blind; now, therefore, be it

Resolved by the National Federation of the Blind in convention assembled this 4th day of July, 1975, in the City of Chicago, Illinois, that this Federation urges that the Social Security Administration be required to establish in each of its regional and district offices a unit which shall deal exclusively with the blind, to make available to blind applicants and recipients of Supplemental Security Income information about other existing as well as other relevant services; and be it further

Resolved, That this Federation urge the Social Security Administration to set up seminars for its personnel which deal solely with the specialized needs of the blind.

Mr. **Burke**. Thank you.

Mr. Steiger?

Mr. **Steiger**. Mr. Chairman, I have no questions. I would like to make two comments on what is, I think, an excellent statement.

First, I have been waiting for somebody to support my position on not changing the 6-month period. I am particularly grateful that I would find a voice in the wilderness willing to deal with that issue.

I am not as yet persuaded, Mr. Chairman, that the claimants and the system and all those we serve would be benefited by a system which might be slightly more efficient, but which I suspect would, as the witness has indicated, create even more appeals, not fewer appeals, in the future.

Second, I am concerned about face-to-face meetings. You make a point of the woman in Pringle, Tex., in the Panhandle, and a single State office in Austin. Then there was the point made by the witness from New York with respect to the telephone perhaps being preferable. I am not sure about that, but it is an issue that I hope this subcommittee will look at very carefully.

I do not think we can conclude that face-to-face meetings hold the answer to all our problems. But this testimony is helpful in raising problems that I think we should look at.

Thank you. I appreciate it very much.

Mr. **Burke**. I agree with you, Mr. Steiger, on your observations, because this cutting down on the appeals period does present problems, and it might work out very unfairly to some people.

I want to point out that the National Federation of the Blind has been working here in Washington since I was new in Congress, and they never come here asking for anything unjust. They don't try to burden the Government with anything that is unjust.

Our witness has indicated in his testimony, which is very good counsel for us, and it gives us time to think it over so that we don't rush in, in an impetuous way, and think we are doing something, and jump from the frying pan into the fire.

We want to thank you for your appearance here today, Mr. Gashel. We appreciate your testimony.

Mr. GASHEL. Thank you, Mr. Chairman.

Mr. BURKE. This completes our hearings until October 20, when Hon. James B. Cardwell, Commissioner of Social Security, and Hon. Robert B. Hampton, Chairman of the Civil Service Commission, will appear and give us some answers on how they feel the problems should be straightened out.

The committee stands adjourned for the day.

[Whereupon, at 5:05 p.m. the subcommittee recessed, to reconvene at 10 a.m., Monday, October 20, 1975.]

DELAYS IN SOCIAL SECURITY APPEALS

MONDAY, OCTOBER 20, 1975

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON SOCIAL SECURITY,
COMMITTEE ON WAYS AND MEANS,
Washington, D.C.

The subcommittee met at 2 p.m., pursuant to notice, in room H–140, the Capitol, Hon. James A. Burke (chairman of the subcommittee) presiding.

Mr. BURKE. The subcommittee will come to order.

The purpose of today's meeting is to hear from the Commissioner of Social Security and the Chairman of the Civil Service Commission as to their recommendations to help clear up the hearings and appeals backlog in the Bureau of Hearings and Appeals.

The subcommittee has heard testimony from a wide variety of witnesses concerning the entire disability determination process from the initial determination stage to the judicial review stage. There are serious problems at each of these stages in the present procedures.

It is my intention to have the subcommittee start to consider these matters without undue delay. In view of the schedule of the full committee and the Veterans Day recess, starting at the end of this week, I would like to start our working sessions on the pending subject matter early in the week of November 3.

We will now recognize the Commissioner of Social Security, James B. Cardwell, and the Chairman of the Civil Service Commission, Robert E. Hampton, to receive the Administration's recommendations.

STATEMENT OF HON. JAMES B. CARDWELL, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, ACCOMPANIED BY ROBERT L. TRACHTENBERG, DIRECTOR, BUREAU OF HEARINGS AND APPEALS

Mr. CARDWELL. Mr. Chairman, I would like to make a very brief statement. Pursuant to the request of this subcommittee, I have met with Chairman Hampton of the Civil Service Commission with regard to section 3 of H.R. 8911 and the general status of SSI hearing examiners. I am accompanied by Robert L. Trachtenberg, Director, Bureau of Hearings and Appeals and Chairman of the Appeals Council, Samuel E. Crouch, Acting Director, Bureau of Disability Insurance, and Donald A. Gonya, Deputy Assistant General Counsel for Social Security of the Department of Health, Education, and Welfare.

We have agreed to an alternative provision which both the Civil Service Commission and we support. The alternative would:

1. Permit SSI hearing examiners to hear not only title XVI SSI cases but concurrent SSI-social security cases as well;
2. Specify that SSI hearing examiners would be classified at GS-14; and
3. Change the qualifying work requirements from 5 years to 6 years.

I recommend that this alternative provision be substituted for the provisions now contained in section 3 of H.R. 8911.

So far as H.R. 8018 is concerned, we do not oppose the provisions in sections (1) through (6), which would make changes in the appeals procedures of the Social Security Act. We do oppose the provision in section (7) of the bill, which would classify social security administrative law judges at a higher grade level. While there might well be a need to classify some administrative law judges at a higher grade level, we believe that the matter should be decided through the classification process, where the character and the merit of the individual assignment can be taken into account, rather than by legislation setting a specific grade level for all of them.

This concludes my opening statement. We will answer any questions you may have.

Mr. BURKE. Thank you, Mr. Cardwell.

We will now hear from Mr. Hampton.

STATEMENT OF HON. ROBERT E. HAMPTON, CHAIRMAN, U.S. CIVIL SERVICE COMMISSION, ACCOMPANIED BY CHARLES J. DULLEA, DIRECTOR, OFFICE OF ADMINISTRATIVE LAW JUDGES

Mr. HAMPTON. Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before the subcommittee. The subcommittee's inquiry concerning the backlog of cases and processing time at various levels within the Social Security Administration is most timely. I would like to direct my remarks to the utilization of hearing examiners appointed under title XVI and to the chairman's request that this matter be given further consideration by the Social Security Administration and the Civil Service Commission.

Concerning the supplemental security income program, the Commission gave careful consideration to this matter after enactment of title XVI and concluded that title XVI, on its face, as well as in its legislative history, contained language which exempted the SSI hearing examiners from the Administrative Procedure Act.

During the current hearings, attention has been focused on the large number of cases pending at the hearing level in the Social Security Administration and on the hearing examiners appointed under the provisions of title XVI. Information presented to the committee discloses that cases arising under the supplemental security income program—approximately 35,000—represent almost one-third of the agency's entire pending case load. Approximately 60 percent of these supplemental security income cases—20,000—involve issues arising under title II of the Social Security Act. These are known as concurrent cases. The agency is of the opinion that it is unable to utilize these trained supplemental security income hearing examiners numbering approximately 200 on these concurrent cases.

In line with Chairman Burke's request, I met with Commissioner Cardwell of the Social Security Administration to explore various alternatives in order to provide the agency with the flexibility it needs to reduce its backlog of cases; and members of our staffs have also met to consider various alternatives.

During these meetings, the Commission expressed the opinion that the authority given to the Secretary in title XVI was sufficiently broad to support an administrative determination by the agency to use the supplemental security income examiners to hear and decide the concurrent cases. While the officials of the agency were favorably disposed to using SSI hearing examiners to hear concurrent cases because of the flexibility it would provide, they felt that such procedures could not be implemented administratively. Therefore, the Commission is proposing that H.R. 8911 be amended in line with the contents of my letter to Chairman Burke of today's date. In that letter we express objections to the personal provisions of section 3 which change the nature of the appointment of existing SSI examiners [3(b)]; which provide for the appointment of additional hearing examiners on a temporary basis, not to exceed December 31, 1978, and which waive the restrictions contained in the Whitten amendment against accelerated promotions [3(c)].

Rather than create a third class of hearing examiners, as provided by section 3(c), the Commission recommends instead that section 1631 (d) (2) of title XVI of the Social Security Act as amended to provide temporary authority, not to exceed December 31, 1978, for the Secretary to utilize the hearing examiners appointed under title XVI to adjudicate concurrent cases, claimants seeking benefits under title XVI and title II. This amendment to title XVI would enable some 200 trained title XVI hearing examiners to begin immediate adjudication of the large number of backlogged cases and would provide the needed administrative flexibility.

We believe that this amendment of title XVI would serve the best interests of the claimants, the taxpayers, and the agency.

I would be pleased to answer any questions the subcommittee may have.

Mr. Chairman, I am not an expert on all of the different statutes and sections of the Social Security Act, but I do want to point out that the Commission will work with the Social Security Administration, and your committee, and that we will do whatever is possible to assist in eliminating these backlogs to better service the people making claims.

Mr. **Burke.** Commissioner Cardwell, how does your agency react to Mr. Hampton's proposal?

Mr. **Cardwell.** As we understand the proposal, we would find it acceptable.

The advantage it would give the Social Security Administration at this time is that it would permit us to utilize the title XVI hearing examiners for the so-called concurrent cases.

If you recall, during the last hearing, the issue came very rapidly to the surface that we were unable to maximize the use of our scarce manpower because of this anomaly in the present arrangement; namely, that title XVI hearing examiners could only process title XVI cases, and as a result, they were being underutilized, both for the moment and for the foreseeable future.

This proposal would eliminate that problem, at least during the time period proposed by Chairman Hampton.

I think that the Civil Service Commission and the Social Security Administration probably have different reasons for consideration of a temporary time period.

For example, I think the Civil Service Commission assumes that the Social Security Administration has a temporary workload problem, and indeed we do have a temporary workload, and in that sense, we should all approach it on the grounds that it is time related.

On the other hand, the anomaly of having two classes of hearing officers, and having also to anticipate concurrent case workload, needs to be solved permanently.

Now, perhaps a better way to deal with the permanent solution to that problem would be to reexamine, as this committee has suggested, the whole question of the hearings and appeals process, at least as applied to the Social Security Administration.

Mr. Burke. As I understand you, you propose legislation that would allow SSI hearing examiners to hear SSI and Social Security hearing cases, and which would establish a grade level for these individuals of GS–14.

Why can't you do that administratively?

Mr. Trachtenberg. You probably could. However, you run the very serious risk of having a large number of cases set aside in court, because of the fact the SSI hearing examiner is not appointed under section 3105 of title V as an administrative law judge, yet he would be hearing title II cases which are subject to the Administrative Procedure Act.

We would be having a non-APA individual hearing a concurrent title II-title XVI case, whereas maybe right next door in another hearing room, you would be having an ALJ hearing the title II only case. It raises serious due process questions in terms of whether the court would accept the lesser standards for the SSI hearing officer.

Mr. Cardwell. The question is this: If a claimant were to challenge the adverse decision by a title XVI hearing officer on the grounds he was not duly appointed and properly trained, how would the court react to that challenge?

That is the issue. The assumption is that this situation could well result in a number of challenges, and perhaps in a number of reversals.

No one can actually predict how it would turn out.

Mr. Burke. Mr. Cotter?

Mr. Cotter. Commissioner Cardwell, these 200 extra men, how long will it take to clear up this backlog?

Mr. Cardwell. Well, there really are not 200 people. There are 200 employees authorized to process the total SSI only cases, and we have run into the anomaly of having a tremendous backlog of title II cases. We also have come to realize, as Chairman Hampton pointed out, that a large number of those cases involve the issue of whether or not a person is entitled to either title II and/or title XVI benefits. Rather than having those handled separately, we would like the authority to handle them concurrently by the SSI hearing officer.

In any event, the use of these staffs, plus the addition of the administrative law judges, according to the plan that Mr. Trachtenberg described at our last hearing, should help us toward reducing the backlog over a 2-year period.

Bob, would you like to speak to that in detail?

Mr. TRACHTENBERG. We see the SSI only cases, not the concurrent cases, being under control in June of 1976. Under control meaning our median processing time would be about 90 days.

Mr. COTTER. Following that, the 2-year period, we can expect these cases to be heard in a timely fashion.

Mr. CARDWELL. That is our objective.

Mr. TRACHTENBERG. I might add the 2-year period was based on an estimate that the 200 people we are talking about would be available for all cases. I have not reprojected our estimates of whether we would clear out the backlog for all cases, if they are limited only to the concurrent cases. I have to look at that. It might be somewhere further down the pike.

Mr. CARDWELL. The evidence seems to suggest the concurrent cases would keep the 200 hearing officers busy, either on concurrent cases or title XVI cases, and that those two workloads should be sufficient to kep them fully occupied for that period, and should permit their full utilization toward that share of reducing the backlog.

Mr. BURKE. Mr. Archer?

Mr. ARCHER. Assuming the act were to be amended as you suggest, to permit the temporary adjudication of concurrent cases by SSI hearing examiners, do you feel hearings in such cases could be conducted under the APA?

I do not know whether Mr. Trachtenberg really covered that.

Mr. HAMPTON. They are not now in my understanding adjudicated under the APA.

Mr. ARCHER. Do you feel they should be conducted under the APA?

Mr. HAMPTON. My personal opinion, no, sir.

Mr. ARCHER. Mr. Cardwell, what do you think?

Mr. CARDWELL. I think you have both the theory to concern yourself with, and also the practical problem that Mr. Trachtenberg spoke to.

I think I could join Chairman Hampton in describing the theoretical system, wherein all such cases involving benefit payments could be handled by a process other than the APA process.

On the other hand, as long as title II cases are under the APA, and the proposal would not change that, it seems to me that the concurrent cases have to be processed and treated under that system, or you have another anomaly, a substitute anomaly, the type that Mr. Trachtenberg described, where you might be challenged on how you follow two different processes in the same case.

It may be that this is just an academic matter. I don't really know.

Mr. DULLEA. It seems to me that we are dealing with a hybrid situation really. I think the courts have held, the Supreme Court, that the substantive provisions of the APA do not apply to the SSA process.

In fact, that was the position of the Department in its brief to the court in that matter (*Perales*). We do have the anomaly that the APA personnel provision applied. I do not have the concern that Mr. Trachtenberg has expressed that the court would upset the process. I think in large measure, it has been utilizing the personnel section of the act, but not the substantive section of the act, in regard to the SSA process.

Mr. ARCHER. Mr. Hampton, if you were establishing, for the very first time, hearings and appeals procedures and policies for both SSA and SSI, how would you go about it? What machinery would you attempt to provide in the law, if you could start from scratch?

Mr. HAMPTON. I am not that totally familiar with what goes on in the process inside Social Security.

From what I understand, these are nonadversary types of procedures, in which the Government is not a party, and which many of the people who come before Social Security are not represented by attorneys, so I think the simplest procedure designed to give them fair due process, that you have—like in a number of different types of administrative proceedings—designed to get at the factual situation, could be designed, but I would not want to do it not knowing all of the different kinds of problems, or to try to design it procedurally without considerable consultations.

Mr. ARCHER. Well, your representative at a previous subcommittee hearing was asked to supply an answer to a similar question. We have not received any written recommendations. In fact, I think I asked that of several witnesses, and to my knowledge, we have not received any recommendations, and I wonder if you would like to add anything to that.

Mr. DULLEA. I can respond to the question you put to me, Congressman Archer.

I did prepare a letter in response to your question, and just prior to the meeting between Chairman Hampton and Commissioner Cardwell, I thought that the letter I had prepared might be made a part of the chairman's statement; however, the result of that meeting did not seem to make it relevant, the response I had prepared to your question.

Since that meeting, and since the chairman's prepared statement did bring it to issue, I did have my own views on this, strictly personal, typed up, eight pages in rough.

I have a few copies here. I could give them to you now, or I could give you a written response to the question originally raised, I could give that to you.

Mr. ARCHER. We would be pleased to have that for the record, if you could provide that to the subcommittee.

Mr. DULLEA. I would be pleased to do that.

[The document follows:]

RESPONSE TO CONGRESSMAN ARCHER SUBMITTED BY CHARLES DULLEA, CIVIL SERVICE COMMISSION

By way of background, the purpose underlying the Administrative Procedure Act should be noted. It was designed for the full-blown, trial-like proceedings common to the regulatory agencies—distinct from cases in agencies responsible for administering various benefit-type programs. This is demonstrated in one of the important studies that led to enactment of the Administrative Procedure Act—the Report of the Attorney General's Committee on Administrative Procedure. On page 263 the report drew a line of distinction between programs for "formal" adjudication and others concerned with "benefactions". The report stated that, "In the field of benefactions, . . . which has broadened with the years, the administrative determinations, though made after a process of adjudication, are obviously not part of any program of control or regulation, but are merely ascertainments of entitlement to Federal gifts". Included in the latter category were programs dealing with pensions, insurance, compensation, the disbursement of monetary benefits, aid, old-age assistance programs, etc. This standard for determining the types of programs appropriate for formal adjudicative hearings appears to have been followed for many years.

In 1947, 17 agencies with a total of about 195 Examiners were brought under the Act. In the ensuing 28 years there was no legislation suggesting that the Administrative Procedure Act was an "all purpose" vehicle for the adjudication of all types of cases. During this period the number of regulatory agencies increased by one-half and the number of Examiners increased at the same rate. However, there has been a forty-fold increase in the number of Presiding Officers in the Social Security Administration. This huge increase has been caused by the addition of programs years after the enactment of the Administrative Procedure Act. Significantly there was no reference to the Administrative Procedure Act in the legislation establishing these new programs (disability, medicare, black-lung, Supplemental Security Income). On the contrary, a trend away from the Administrative Procedure Act can be seen—the black-lung program exempted application of the Administrative Procedure Act; so too did the Supplemental Security Income program, and an exemption appears in recent bills such as S. 1842 (93rd Congress).

While the modest increase in regulatory agencies represents an effort to insure due process through formal hearing procedures conducted by independent examiners, due process is not an absolute and does not require the application of the Administrative Procedure Act to all types of administrative hearings. In this connection note should be taken of *Goldberg* v. *Kelly*, 377 US 254, *Twigger* 1. *Shultz*, 484 F2 856 and *Richardson* v. *Persales*, 402 US 389. Significantly, in the latter case the Supreme Court declined to decide the question of the general application of the Administrative Procedure Act to a disability proceeding and required only that these hearings be "fundamentally fair", page 410.

In the light of this standard, one should carefully analyze the impact on the public, on claimants and the agency by over-judicializing programs which involve an intake of claims approaching one and one-half million; reconsideration of denied claims approaching 300,000 yearly; a pending caseload at the hearing level involving 100,000 individuals (in whose favor 50,000 decisions will be rendered); 15,000 cases on review before the Appeals Council which finds in favor of claimants at the rate of 14 percent; and the District Courts which have been reversing and remanding cases at a rate (combined) of 40 percent, expecting 7,000 cases this year.

There are systems of adjudication outside of the Administrative Procedure Act which apparently function expeditiously and fairly. In terms of developing a procedure suitable to the Social Security Administration, the aspects of those systems that are appropriate to the types of cases administered by the Social Security Administration should be considered with the view of devising a system meeting four standards: 1) the prompt resolution of claims; 2) adjudication by "impartial" hearing officers; 3) fairness to claimants in an informal setting; and 4) due regard for the agency's responsibility to manage the program effectively.

In view of the magnitude of the Social Security Administration programs, the system would probably require three levels: 1) It would clearly be in the interest of the public and claimants to maximize the development of pertinent information at the initial level in order to dispose of the greatest number of cases at the earliest point in time. This would, in turn, provide an adequate record for subsequent review and eliminate the costly and time-consuming development of additional information at subsequent levels; 2) The reconsideration stage as it now operates seems to be an empty gesture—a review on a cold record—and, as such, might be eliminated. A meaningful and productive review should afford the opportunity for a personal statement by the claimant. (This was tested some four years ago and proved to be a success (the SARIS program produced a 20 percent increase in dispositions and a decrease in the number of requests for hearing).) A statement of reasons should be issued at this level in order to provide the claimant with a basis for deciding future courses of action; 3) At the next level the testimony of the Commissioner of Social Security at the hearing on September 19 (page 35) should be noted. He indicated that the Social Security Administration should have a hearing corps of its own—outside the Administrative Procedure Act.

Actually, the Administrative Procedure Act does not fully apply to the Social Security Administration hearing process. It is a hybrid system. There are two pertinent sections of the Administrative Procedure Act: Section 554 of Title 5 defines the standard for formal adjudication, i.e., "In every case of adjudication required by statute to be determined on the record". When this standard is met in any legislation, other procedural sections of the Administrative Procedure Act apply; and the second important section—dealing with personnel—is invoked, Section 3105, which controls the examination, appointment, classification and independence of personnel. The procedural parts of the Administrative Procedure Act have little, if any, relevancy to the Social Security Administration hearing; the agency does, however, utilize personnel appointed under the Act. Whether this is in the interest of the public and claimants is for consideration. In regard to classification under the Administrative Procedure Act, the nature of the work involved in some programs appears to be of a level of difficulty well below grades 15 and 16. Yet, the allocation of presiding officers at lower levels would conflict with the Administrative Procedure Act which requires the assignment of presiding officers to cases "in rotation". On the other hand, a single classification—without regard to the difficulty of work—violates the provisions of the Classification Act, dampens employee motivation, eliminates promotional ladders, and is not in the interest of cost-effectiveness. Further, the personnel provisions of the Administrative Procedure Act require that the positions be protected to insure impartiality; accordingly, incumbents are exempt from performance evaluations; can only be removed for good cause established before the Civil Service Commission; and are assured periodic pay increases without certification that their work is of an acceptable level of competence.

While one recognizes the need for some measures to secure "impartiality", one would question the wisdom of providing what, in effect, are life-time appointments and autonomy in work performance for personnel at these lower levels who preside at non-adversarial proceedings. It is for note that not one presiding officer has been removed for either productivity or quality of work in 28 years. Finally, over-judicializing certain programs in terms of both personnel and procedures—where there is no express statutory mandate and no substantive justification would almost certainly have a domino effect—consistency would require that the Civil Service Commission provide other agencies with Administrative Procedure Act presiding officers for a wide variety of programs. In order to establish an appropriate system at the hearing level, the Civil Service Commission should be authorized to establish classes of hearing officers for which it would develope job-related standards and proper classification levels. This authority would permit appointments under competitive merit standards of the best qualified and provide the incumbents with a career-type status. Appointments of this type would preclude concerns that hearing officers were being selected by the agency under its own criteria. The incumbents would not be subject to summary termination and would be provided with a medium for appeals to the Commission from any adverse action. This would counter complaints of agency "control", which is said to inhibit impartiality. And since the relationship of the agency to the claimant is not one of an adversarial character, the general quality of the presiding officer's work and his productivity should be matters of concern for senior presiding officers which would not impact on the incumbents' impartiality in rendering decisions.

Since a current General Accounting Office survey indicates that the average hearing lasts 47 minutes, consideration should be given to a procedure authorizing the preparation by the presiding officer of a summary report of the hearing (subject to approval by the claimant). In this connection, the concern expressed by the former General Counsel about the enormous number of verbatim transcripts which are required should be noted. Consideration should also be given to authorizing the hearing officer to dictate a oral decision into the record at the conclusion of the hearing (a procedure used in another agency with similar types of cases which are conducted in an adversarial setting). This should reduce the 30-day period the Commission's study showed was required by the presiding officer before filing his decision. Given a system which maximizes the assembly of pertinent information at the first level, a meaningful review, and a more efficient and productive hearing procedure, one would question the need for a fourth level of appeals within the agency. In the light of the various procedural changes which have been recommended which should result in a reduced case load, a direct appeal from the presiding officer's determination to the courts might be considered; or, alternatively, the agency appeal level could be maintained and its appellate determinations could be made final without appeal to the courts—a system that is followed in the Veterans' Administration.

In connection with the concerns expressed at the hearing on September 19, the Government ill serves the taxpayers by maintaining systems the administrative cost of which exceed the value of many of the cases; nor does it serve the interests of claimants by over-judicializing cases which often involve relatively modest amounts, [illegible] resolution hinging on questions of fact without any complex legal issues. A perceptive comment along these lines appears in the Report of the Attorney General's Committee on Administrative Procedure (page 63) where it is stated that, "(Fairness) does not mean, however, that formality is a prerequisite. In cases such as those coming before the Social Security Board, the Veterans' Administration, the Railroad Retirement Board, strict formality would hinder the claimants, who often represent themselves and who should be encouraged to tell their own stories as simply and naturally as possible. There, the atmosphere of sympathetic conversation is best conducive to proper administration. On the other hand, formality is advisable in many contested cases."

Mr. ARCHER. I would like to ask all of you one quick question that is specific, and then, Mr. Chairman, I will yield the balance of my time.

I have received an outside suggestion that one thing which could be done to expedite the appeals process would be to close the record, so that it is not continually open, beyond a certain point in the process. What do you think about this? Some people from Texas said this would get rid of a big, big share of the problem.

Mr. CARDWELL. In a way, the answer we would give to your question if we were starting from scratch dovetails with that very question.

I do not want to get into too much detail at the moment, reserving the answer for the written insert you asked for, but one of the choices you could make would be to redesign the whole due process concept, as applied to social security benefit cases.

We think it should be examined, if one would like to look at the matter from scratch, to confine the process to initial adjudication and reconsideration, and to limit reconsideration to whether the law and the attendant regulations were applied adequately and equitably to the individual case.

That theory of due process might be worthy of consideration in this circumstance because I think if you examine this process closely, you will find in the final analysis the process of individual judgment exercised in very large measure in every case, and you will constantly be buffeted by competing judgments as you go through the open record arrangement that we now have, and these judgments are going in every direction.

It does in itself produce, after the fact, quite a strange pattern of review process.

Mr. CONABLE. If you are going to close the record, you will have to be careful about what gets into the record.

The reason you keep the record open is to protect a process that is not all that carefully constructed, really.

Mr. CARDWELL. I agree. I think it puts an added burden on the thoroughness and efficiency of the basic adjudication of claims, and this would have to be examined.

Mr. ARCHER. But you cannot expect the decision at the lower level to be in conformity with the decisions as you go up the ladder of appeals, if you are dealing with different facts.

Mr. CARDWELL. That is right. The facts keep changing in the present system, and very often you have an initial determination at what appears to be the final hearing process, because that hearing officer will be hearing facts that no one else has had an opportunity to consider.

Mr. **Archer.** If the initial decision is not based on all of the facts, then there is something lacking.

We should not have any decisions not based on all of the available facts, and it just seems to me this may be the key to solving a lot of the problem.

Mr. **Conable.** If the gentleman will yield again, you will have to have an approach more elaborate at the initial hearings procedure than you have now.

Most of this stuff can be routinely handled in the interest of speeding up the process, and that is the dilemma.

Either you spend a lot more time in the initial hearings process and close the record, or you leave the record open and continue to handle the great bulk of the stuff on a fairly routine and I suppose largely ex parte basis.

Mr. **Archer.** If the initial process does not bring into focus all of the facts, then we are not doing our job under the law because there are a lot of people who do not appeal, who are being subjected to a decision, where all of the facts are not present.

We want to do justice to all of the people covered by these laws. But once there is an opportunity for all of the facts to come in, it seems to me a very strong argument could be made that the record ought to be closed at some point, so you do not have to continue to embellish and add to this record. As long as you do, it seems to me no matter what other steps we take, we will have this tremendous difference between the decisions that are rendered at a higher level, and the decisions rendered at a lower level.

Mr. **Cardwell.** I think that is generally true.

Mr. **Archer.** Thank you, Mr. Chairman.

Mr. **Burke.** Mr. Karth?

Mr. **Karth.** I have a question.

What is the backlog caseload in SSA?

Mr. **Trachtenberg.** One hundred and six thousand, sir.

Mr. **Karth.** I came out with 105. That is pretty close.

It is an awful lot of backlog of casework.

How soon do you think you will clean it up?

Mr. **Cardwell.** It was about 107,000 when we were here on September 19.

Mr. **Karth.** How long do you think it will take to clean it up?

Mr. **Trachtenberg.** The projections that we developed at the Bureau of Hearings and Appeals indicate that the backlog would be under control by June 1977.

That would be the earliest and most optimistic time of clearing up and stabilizing the backlog.

Mr. **Karth.** And then you will be current?

Mr. **Cardwell.** Current meaning a median processing time of 90 days.

Mr. **Karth.** You are talking about a year and 8 months or thereabout?

Mr. **Cardwell.** Yes.

Mr. **Karth.** Mr. Chairman, I do not care what they call it, or what grade they fall into, or whether or not these people can bask in the luxury of jurisdictional squabbles, I am concerned about the due process that is being denied, and the answer to Mr. Archer's question which I thought was an excellent one, to wit: what kind of procedure would be proposed if we started from scratch, the only answer I heard was something like an eight-page proposal.

I have not read it, and it is my privilege to have a copy of it, because eight pages does not really sound like it is proposing a process that might at any time in the future during our life time get current.

It sounds pretty arduous, lengthy, complicated, and difficult, and I would hope that this Agency would do whatever needs to be done, Mr. Chairman, to correct the ills that I think they are forcing upon those people to whom they have an obligation and a responsibility, and a year and 8 months to get back to where they ought to be does not sound to me like it is a hurry-up process.

Maybe they need more than 200. I do not care what Mr. Hampton's judgment is as to whether or not they ought to be allowed to do it, or whether they ought not be allowed to do it.

I think the question is do you need more people, and if they had more people, how many more do you need to clean it up, and become current in less than half that time?

Mr. **Trachtenberg**. I think there is a direct relationship between more people and quicker processing of the cases.

The point is, what do you do with the people after you become current?

Mr. **Karth**. Well, are you suggesting that if that is the major problem, or because you see that being a problem, we ought not get current for a year and a half?

Mr. **Trachtenberg**. What I am suggesting is that it would be very difficult if not impossible to recruit people to be presiding officers of any form with the knowledge that in a year or so they will be out of a job.

Mr. **Karth**. There is a lot of unemployment. I don't know maybe you need some kind of an inducement.

Mr. **Burke**. Would you yield just a moment?

How many do you expect to retire in the next 2 years?

Mr. **Cardwell**. In the next 3 years we expect 105 hearing officers to retire.

Mr. **Burke**. Have you taken that 105 into consideration with this 200?

Mr. **Cardwell**. Yes, sir.

Mr. **Burke**. You are actually adding 95?

Mr. **Trachtenberg**. We have 445 administrative law judges, those GS-15 administrative law judges that can handle any case.

We have about 125 hearing examiners, these are GS-13's, who hear only the SSI cases, not the concurrent title II-title XVI cases.

We have 95 administrative law judges who are temporary, who hear only black lung cases, and we expect to be out of the black lung program somewhere between January and February of next year.

The 445 administrative law judges, who are GS-15's, will be increased by 55 hopefully in the next 3 months, and our recruitment process in terms of hiring more title II judges, the GS-15's, will continue, and this recruitment will be designed to offset what we expect to be our loss rate in terms of attrition over the next 3 years.

Mr. **Cardwell.** Mr. Karth, I think we put too much emphasis on the negative point about deterrents in terms of recruitment.

I think it is a practical matter. We could not by passing laws or by the most vigorous administrative effort obtain and apply effectively all of the manpower it would take to reduce this backlog in much less time.

Mr. **Karth.** Tell me how you got a backlog of over 106,000 cases.

Mr. **Cardwell.** We got a backlog by having an inherently slow process, which was not designed for this volume of business. The process was designed for a smaller volume of business. Also, the backlog has been building up for 4 years.

Mr. **Conable.** You had special assignments like the black lung cases.

Mr. **Cardwell.** That is correct, and you have situations where, out of necessity, you must force more work on the hearing officers.

You have to have lawyers with 7 years of experience and you have to have a limit on how much you can pay them.

We have gradually been building this hearing corps over a period of time. It is now the largest adjudicative process staff in the Nation, and perhaps in the world.

I am saying there is a practical limit on how much you can solve by adding sheer numbers, and Mr. Trachtenberg has whatever authority he needs to hire whatever numbers he needs.

The Civil Service Commission has to fill those numbers of positions within the rules of the act, and we look to them for support.

We have two very real problems: One is a series of administrative actions to reduce the backlog and then you must ask the question—which is this subcommittee's business—of whether this process is the right process over the long haul for the volume of business. It is almost needless to say that the process is out of kilter with the volume of business.

Mr. **Karth.** I think that the answer I am searching for, would all of the plans that you have got, and the 4 years you have spent watching the problem get worse and worse and worse, what kind of processes have you come up with

If sheer numbers and a change of process means once you get current, you can stay current, it seems to me sheer numbers and some kind of process change means you can clear up the backlog and get current.

Mr. **Trachtenberg.** I agree with your position, Congressman, and I want to dispel any fear on your part that the Bureau has been sitting silently by over the last 9 months that I have been there and not dealing with the backlog.

That backlog was 113,000 cases at one point.

Mr. **Karth.** At what point was that?

Mr. **Trachtenberg.** That was in April. So it has gone down approximately 6,000 to 7,000 cases since then.

We have an intake every month of over 13,000 requests for hearings, 13,000 cases a month.

When I arrived in January, the productivity was about 7,000 cases a month, so not only have we equalized the amount of cases coming in in terms of our dispositions, but we are now cutting about a thousand cases out of that backlog every month.

We are doing it in a variety of ways, the most significant one being that the hearing officers have increased productivity considerably, in some cases up to 40 and 50 percent.

We have done much to eliminate the administrative law judge from nonjudicial functions.

We have done many programmatic things such as trying to have cases decided at a lower level before they get to the hearing process. In such cases after a reconsideration, an individual who requests a hearing, and who appears to have a changed condition, will have his case reconsidered before it goes through the costly appellate process of the Bureau of Hearings and Appeals.

Mr. Karth. Tell me about these productivity increase changes that took place?

Explain to me what you mean.

Mr. Trachtenberg. I guess the easiest way to explain it is in terms of numbers.

In the Bureau, each hearing officer was disposing of something around 14 cases per month in January 1975.

Mr. Karth. Per individual?

Mr. Trachtenberg. Per individual.

We are now disposing of 21 cases per individual.

Mr. Karth. Tell me how that came about.

Mr. Trachtenberg. This came about largely as I indicated, though removing the ALJ from nonjudicial functions. We gave him more staff. We installed mag card machines in hearing offices that could quickly issue the decisions through standardized texts that are fed into the mag card machine.

Mr. Karth. Is he working any harder?

Mr. Trachtenberg. He is working a lot harder, I think; yes.

Mr. Karth. Eight hours a day?

Mr. Trachtenberg. I think so. You should not undersell what 20 cases a month is.

Mr. Karth. I am not underselling it. I am asking questions.

Mr. Trachtenberg. Let me put it into this context. Twenty cases a month represents a hearing a day in effect. In addition, that administrative law judge is involved in a great deal of development of the casework that relates to the issue of whether we should have a closed record at a particular point, and there is a lot of merit to it.

Mr. Karth. What it comes down to is bodies, the number of bodies does in fact have something to do with the backlog or reduction of backlog, and I understood you to say this is not necessarily true.

Mr. Trachtenberg. Only in so far as the presiding officer is concerned. One of the key things we are doing is in the area of staff attorneys. We hope to hire 300 staff attorneys to aid the judges in the development of the cases and in the rendering of decisions.

We hope to have more hearing assistant support and more clerical support. This kind of activity is very essential, and that is what we are doing.

What I am suggesting is in the area of additional residing officers, that there is a point of no return where you become saturated.

Mr. Karth. I do not want you to become saturated. There is too much feeling, and the President is on television three times a week talking about the saturation of the bureaucracy now, and I would not want him to talk about that 4 days a week. I do not want to you to become saturated. All I want to do is clean up the backlog so these people do not have to suffer.

Mr. **Trachtenberg**. That is what I want.

Mr. **Cardwell**. We do want the same thing. I think Mr. Trachtenberg, who is there specifically for the purpose of reducing the backlog, has done this job for about 9 months.

I think what we are trying to say is that there is a practical limit on how much administrative improvements, improvements in individual productivity, improvements in leadership and management, and in addition, in sheer numbers we can do over a fixed period of time.

When we think we know roughly what that limit is, you should decide whether that is sufficient and whether the 90-day processing level is really as fast as you want to go.

It it is not, I think the next choice is to change the law, and this invites you possibly toward some rather radical changes.

For example, if you waive the requirement that lawyers with extensive skills must conduct these hearings, and prescribe some process where you could handle a case in 10 days, and thus we could station thousands of people around the Nation, we could reduce the backlog. That, of course, would require a change in the law.

I do not think I would recommend that to you. It would mean chaos. You would wipe out the backlog, but I think you would have thousands of people clamoring for the due process that they feel they have been denied.

Mr. **Karth**. It might mean more paraprofessional people, and deny the possibility that these people could do a great deal, but it does seem to me this is not exactly equivalent to Supreme Court cases.

Mr. **Cardwell**. Paraprofessional people cannot try the cases. They cannot be used to carry the case from beginning to end.

Mr. **Archer**. Will the gentleman yield?

I just want to follow up with a question on the judges who are scheduled to retire.

Is there any change in the law that we could make, to enable them perhaps to stay on temporarily, so as to eliminate this recruiting problem, and this difficulty of having additional people who would no longer be needed after a couple of years.

Mr. **Trachtenberg**. I would like that, but the Civil Service Commission should respond to that question.

Mr. **Hampton**. We could do that administratively, and that is a good idea, we could have this 105 people who are willing to take their retirement, they could come back as a reemployed annuitant, and they could work on the backlog, and you would have retained the value of their experience.

Mr. **Archer**. But you can do all of that administratively?

Mr. **Hampton**. We have done it with the regulatory agencies.

Mr. **Cardwell**. I think these people are retiring for one or more reasons. One is that some of them are just tired, and they do not feel their work is appreciated. You will not be able to buy back these people.

There is a second group that I think are retiring for economic advantages. As reemployed annuitants, these economic advantages would not be realized.

In fact, in some cases, for people who want to draw their lump-sum leave payments as part of their settlement, they find they cannot do that until they have completed their reemployment assignments.

I would just say to Chairman Hampton, as I say to you, I really do not think we have present today all of the incentives that you would need, if you wanted to maximize the number of people who are going to stay on the job, once they become eligible for retirement.

I do not think they are available for this purpose and for Federal employment generally.

Mr. **Archer**. That gets back to my question, should we change some provision in the law, to put a temporary incentive in here to get us over this hump?

Mr. **Cardwell**. It is really Chairman Hampton's question to answer, because it is questionable whether you can do this with one small block of employees and not for Federal employment generally, and I would have to underscore that concern.

Although I do not know the statistics, I do not really think that retirement is a significant issue.

Mr. **Burke**. Mr. Conable?

Mr. **Conable**. Mr. Trachtenberg, is the Appeals Council justifying itself, at a level of about a third of your staff?

Mr. **Trachtenberg**. I would say largely so in total candor, yes.

Mr. **Conable**. How many positions are there in the Appeals Council?

Mr. **Trachtenberg**. The Appeals Council members themselves in the neighborhood of about 450 people, many of whom are hearing and appeals analysts who review the cases.

Mr. **Conable**. The figure of 1,300, what is that?

Mr. **Trachtenberg**. That includes total support in the central office for the Appeals Council.

Mr. **Conable**. That is a pretty good hunk of your help.

Mr. **Trachtenberg**. It certainly is. My hesitancy in answering the question really stems from a question in my own mind in terms of what the Appeals Council is designed to accomplish.

Mr. **Conable**. It is both a quality control body and an appellate body, right?

Mr. **Trachtenberg**. It is something more than that now, and this is really what causes my hesitancy.

It is a fourth adjudication of the claim in many respects. It looks at that case, just as the administrative law judge did, except it basically has the same record as the administrative law judge.

Mr. **Conable**. It takes additional evidence also.

Mr. **Trachtenberg**. It does.

Mr. **Conable**. So it is not possible to move the way Mr. Archer was suggesting, by closing the record before it gets to the Appeals Council? You have three de novo considerations, of a typical case, before it gets to the Appeals Council, and then they open up the record again. It does not sound very efficient.

Mr. **Trachtenberg**. I agree, and that is what I was leading to. I do not think a fourth adjudication is worthwhile or that it supports the resources involved.

Mr. **Conable**. But they do take additional evidence again, don't they?

Mr. **Trachtenberg.** They do have that authority.

Mr. **Conable.** I question whether they should be reviewing cases on the record so late.

Now, how about their quality control aspect, are they reviewing the decisions of the administrative law judges and the hearing examiners?

Mr. **Trachtenberg.** Only of the administrative law judges' decisions that relate to requests for review filed by the claimants. That would be the area where the Agency would take its own motion, and since April 1975, I have discontinued the review of the reversals. I have done that temporarily, because the resources expended in that area compared to the benefits received in terms of reversing the decisions have not paid off.

Mr. **Conable.** The quality control is comparatively a modest part of the function.

Mr. **Trachtenberg.** It is something like that.

Mr. **Conable.** And apparently the extent it is still done at all is a function that is atrophying due to action on your part.

Mr. **Trachtenberg.** To the contrary. What I hope to establish now are two aggressive aspects of the Appeals Council, as opposed to the full adjudicatory aspect: One is quality control, which is virtually nonexistent, and the second is making it more of an appellate function.

Now, in the area of the quality control aspect of it, we are for instance now remanding more cases to ALJ's, so they can understand why cases are going back to them for additional evidence, or for reconsideration of their decisions.

There has been no learning process. There is no feedback that existed from the Appeals Council, back to the ALJ corps in terms of improving the ultimate quality of the decision. These are the kinds of things now being done.

Mr. **Conable.** Do you review hearing officer decisions?

Mr. **Trachtenberg.** Instead of our doing the review here, we have structured an arrangement whereby the bureaus can protest on the record where they disagree with an ALJ's decision.

Mr. **Conable.** What does a GS–15 make?

Mr. **Trachtenberg.** Starting salary is $31,000; it goes up to $36,000.

Mr. **Conable.** Such a man has to be a lawyer, and are there any other qualifications that you require that make it difficult for Civil Service to find them?

Mr. **Trachtenberg.** It is not our requirement. Again, I would have to defer to the Civil Service Commission. They are responsible for the recruitment and examination of individuals before they are placed in an agency.

Mr. **Conable.** Do you have any vacancies now?

Mr. **Trachtenberg.** We hope to fill 56 positions in the next 3 months.

Mr. **Conable.** They are fully authorized, but they have not filled because of the rate of attrition?

Mr. **Trachtenberg.** It has been the rate of attrition and the fact that they have been fully authorized.

Mr. **Conable.** Do you feel that you are under any budgetary constraints at all at this point in doing what is needed to move on this backlog?

Well, I can understand your sensitivity about getting highly qualified personnel, and that is clearly something quite different from budgetary constaints.

I wonder what is your answer?

Mr. Trachtenberg. I feel I have gotten as much of the budgetary support as I could in the area of hiring presiding officers, ALJ's, hearing examiners, and so forth.

I feel the major thrust in terms of changing the process has to be in the area of additional support staff, the paraprofessionals, people of this nature. We are part of the Social Security Administration, and there are other competing requirements.

I think I need more than has been presently authorized, and I have an appeal pending with the Commissioner right now on that.

Mr. Cardwell. Mr. Conable, if I could put it to you this way, Mr. Trachtenberg does not have a carte blanche authority to employ people he wants to employ.

None of us in the executive branch has that kind of authority. I think the real question is, do you feel, if you make your case, that you will get the support you want.

As far as I am concerned, he has a priority, and he will do what he has to.

Mr. Conable. I can understand the high priority you place on the backlog reduction.

Mr. Burke. Mr. Steiger.

Mr. Steiger. Mr. Commissioner, this subcommittee has some 700 bills referred to it, and we have asked for reports on 180 of them. We have received reports on eight, and I wonder if there will be some improvement in the track record with respect to preparing reports on pending bills, particularly H.R. 8018 and H.R. 8911.

Mr. Cardwell. I spoke to H.R. 8018 in my testimony.

Mr. Steiger. Can we expect some improvement, however, in the speed with which reports are issued?

Mr. Cardwell. Speaking for the Social Security Administration, you can, but I cannot speak for the whole executive branch.

Mr. Steiger. I know you cannot speak for the whole executive branch.

Mr. Cardwell. As you know, the initiative on social security bills would start with the Social Security Administration, would go to the Office of the Secretary, and then OMB, and then back through the Office of the Secretary, and then to this committee.

I would say to you, I am as discouraged and disappointed with the slowness of that process as I think this committee is.

If you will permit me to say it, I think we are badly constipated, and it has become almost a way of life in the Federal Government.

On the other hand, giving myself the maximum credit, I think the Social Security Administration is the least of your problems.

Mr. Steiger. That will not be the first time the agency has said that. There is that historic bottleneck.

Mr. Cardwell. We are a part of the problem, but I think we are the least significant.

Mr. Steiger. I understand the steps to be taken. It makes our job harder, and makes it difficult for us to move.

Mr. Cardwell. I have worked at every level, including staff level for Cabinet officers, and I do not think we need that many steps, but I have not been very successful in convincing many people.

Mr. Steiger. Mr. Hampton, section 3, H.R. 8911, says in effect that you would put SSI on the same footing, both administratively and judicially as title II.

Do you support that concept?

Mr. **Hampton**. No; I think our comments, you are talking about 8911, correct?

Mr. **Steiger**. Yes.

Mr. **Hampton**. It would give the authority to the Social Security Administration to allow them to use the title XVI hearing examiners to handle these concurrent cases without going and putting them all under the Administrative Procedures Act.

Mr. **Steiger**. If you go the route of hiring temporary people through the year 1978, what happens at the end of that period of time?

Mr. **Hampton**. My understanding of that, and I did not participate in the last minute discussions on that, was that there was a limitation on the authority to do that, rather than appointing necessarily in a temporary capacity.

Now, my understanding may be incorrect.

Mr. **Cardwell**. That is the same understanding I have.

The authority would be temporary authority to utilize a regular and continuing employment for this particular purpose.

After that time, you would have to consider how you would deal with the problem of concurrent claims cases.

Mr. **Steiger**. Thank you.

Mr. **Cardwell**. I want to be sure the record is complete on this point.

You would have a question of what happens to the higher grade level that this provision would authorize for that period—which is in keeping with standard practices—if you assume the person holding that higher grade level would be holding it for a temporary period.

Mr. **Steiger**. You would put them in that higher grade level only during that period of time?

Mr. **Cardwell**. I assume that.

Mr. **Steiger**. Mr. Chairman, let me make one comment, if I may, I appreciate the fact that both the Commissioner and the chairman were willing to at least sit down and talk with one another, and then to come here and talk with us. I am not totally satisfied, I must admit, with where your discussion has come out, but it is a long way from where you were to start with, and I have to give both of you credit for having been willing to go that far.

Mr. **Cardwell**. I have met with Chairman Hampton about three times in the last 2 months, and I find he is extremely cooperative interms of getting things done, and that is really what we have to do.

We have to get on with it.

Mr. **Burke**. Mr. Pickle.

Mr. **Pickle**. Thank you, Mr. Chairman.

Well, I am not satisfied yet that you hit on this happy answer.

What you have done is you have raised the hearing examiners to GS–14 from 13.

Mr. **Cardwell**. Title XVI hearing examiners, yes.

Mr. **Pickle**. And let them hear the concurrent cases.

Mr. **Cardwell**. Yes.

Mr. **Pickle**. Now, how many personnel will that change bring in itself?

Mr. **Cardwell.** It would broaden the application of approximately 200 employees, permit them to conduct hearings on cases that they cannot now conduct.

It would not increase the total number, but it should increase the productivity of these 200 employees.

Mr. **Pickle.** The number of people you have will basically be the same, it does not add anything to your staff?

Mr. **Cardwell.** Correct.

Mr. **Pickle.** I can see how if you make increases in staff, take away some of the paralegal responsibilities the examiners have been carrying on, and let them work full-time on their main duties, this will pick up their productivity. That is good. I do not know why you did not do that a year ago. But even if you do that now, I am concerned about the number of personnel. When you testified here last month, Mr. Cardwell, at that time, you had 436 ALJ's, 124 hearing examiners, and 95 of the temporary ALJ's, and you may have added 10 to that ALJ number, but roughly you still have the same number.

Mr. **Cardwell.** Correct.

Mr. **Pickle.** And now with this great new change that you are proposing, the numbers will stay the same, but you think productivity will pick up because of it?

Mr. **Cardwell.** Yes.

Mr. **Pickle.** When you testified, Mr. Cardwell, you said the difficulty you had, if I remember correctly, was that you could not hire anybody. You could not hire the number you were trying to get. You said that you requested 75 ALJ's, and you got 43, whatever it was, and that was because Civil Service was very, very slow in sending over the rest, the residue that you could hire. Is that correct?

Mr. **Cardwell.** I do not remember it coming out just that way.

I think we said that we expected there would be inherent difficulty in recruiting, and rapidly filling all of the ALJ positions.

I think Mr. Trachtenberg did give you some statistics on the numbers at that time.

Mr. **Pickle.** The staff could correct me, or the record could show it, but it seemed to me the testimony was very clear, if you were not combining, you were observing out loud, you could not hire the people, that it does not do any good to hire if you do not have the men you could choose from.

Mr. **Cardwell.** I did make the statement, and I'll make it again. I think there is a practical limit to the numbers of trained and skilled workers in the employment market that the Civil Service Commission can draw from in order to satisfy what I believe to be very significant training experience requirements inherent in the Administrative Procedure Act.

I said it to Chairman Hampton and I will say it to anybody listening to me that I really believe that to be true.

Mr. **Pickle.** Is civil service now giving a full register from which you can hire—are you, Mr. Hampton?

Mr. **Hampton.** Mr. Dullea can answer that.

Mr. **Dullea.** The Bureau asked for a full list before September 19. On the 19th we furnished the Bureau with 120 names. The Bureau Director indicated he wanted to hire 55 people. He has had that list in hand since then.

Mr. PICKLE. And he has not hired them?

Mr. TRACHTENBERG. We are in the process now of sending out letters of acceptance.

Mr. PICKLE. Over a month ago, you could have had 55 more potentially, but you have not processed them?

Mr. TRACHTENBERG. No, but we will.

Mr. PICKLE. When will you?

Mr. TRACHTENBERG. We will have a class by January. The process is not as simple as taking a person off the register and appointing him.

It is a process that the Civil Service Commission oversees, and reviews after we complete our responsibilities on it, and it is a rather detailed process.

One of our problems is getting enough out of that 120 to go to the locations where they are most needed.

Mr. CARDWELL. I think we did have some statistics about the phenomenon of having a larger pool that would produce a smaller net number who would be willing to take assignments convenient to our workloads.

Mr. TRACHTENBERG. In our projections of getting control of the backlog by June 1977, we have been talking about, as I mentioned earlier, an integrated nucleus of over 600 presiding officers, call them what you will, but over 600 presiding officers to handle all categories of cases, title II, title XVI, concurrent, black lung, name it.

That is what our projection is based on. If I went to the Civil Service Commission, and I said I have 440 ALJ's and I want to hire another 200 administrative law judges to meet my requirement of 600, this is where the problem would exist. That is why the initial proposal related to the use of these 200 hearing examiners as temporary administrative law judges to hear all categories of cases. But if I had to hire 200 hearing examiners right now, there would be a serious problem.

Mr. PICKLE. I could see why it might be. A month ago one of the complaints was you did not have anybody to hire, you did not have enough even to hire, you did not have the bodies there to choose from.

Now you say you have the bodies, and it is a slow process. I do not question it, I accept it, but I do not know why that same point was not made before.

You have now 95 temporary ALJ's handling the black lung.

Are they classified as ALJ's?

Mr. TRACHTENBERG. They are temporary.

Mr. PICKLE. At what grade 15?

Mr. TRACHTENBERG. 14

Mr. PICKLE. Will this upgrading that you have recommended classify these people then as the same as these temporary ALJ's, will they be the same?

Mr. TRACHTENBERG. They will be the same gradewise.

Mr. PICKLE. With the same authority?

Why can you make these 95 ALJ's, but you won't make these hearings examiners ALJ's?

Mr. TRACHTENBERG. The Congress passed a law authorizing the temporary appointment of the black lung ALJ's.

Mr. PICKLE. And you cannot do it then unless we pass another law?

Mr. TRACHTENBERG. Yes.

Mr. PICKLE. And if we did that, we could make that 95 available to handle cases?

Mr. TRACHTENBERG. Yes.

Mr. PICKLE. Do you recommend that?

Mr. TRACHTENBERG. Well, that is not what the compromise arrangement reflects.

Mr. PICKLE. Aside from that, would not that be a good group to have?

They are familiar with their work, they have had 2 to 3 years' experience, their workload is diminishing now. Why could you not go ahead and do that?

Mr. CARDWELL. The idea has been that those 95 black lung judges are fully occupied at the moment. As their work plays out, they would be eligible to be rehired as hearing officers. That has been our plan.

Mr. PICKLE. I have a feeling you will not let those 14's be ALJ's period.

Mr. CARDWELL. Our assumption is they will still be hearing officers if they have demonstrated that they have the necessary skills.

Mr. TRACHTENBERG. The 95 black lung ALJ's, at the GS–14 level, have backup rights as GS–13 hearing examiners.

When they complete their responsibilities under the black lung program, they will then become hearing examiners like the GS–13's.

Under the proposal that was presented to the subcommittee, that entire universe of people, the black lung people with the backups, and the SSI hearing examiners, will probably be promoted to GS–14's to handle the concurrent cases.

They will not carry the title administrative law judge, and that is something the subcommittee will have to determine in terms of legislation.

Mr. PICKLE. I would hope we could get a recommendation from you about how we could use these people for what they are doing.

Why can't we just move them over, if it will take an act of Congress, so you have 95 more people, and then your problem is cut considerably.

Mr. TRACHTENBERG. The proposal allows me to use the 200 people. The 95, plus the 125 hearings examiners, to do the cases that they cannot do right now. That is what it does.

Mr. PICKLE. But you are doing it by classification, period?

Mr. TRACHTENBERG. We are doing it by recommending a legislative change.

Mr. PICKLE. Does this do anything to settle the problems relating to the Administrative Procedure Act?

Mr. TRACHTENBERG. No.

Mr. PICKLE. It does not get into that at all?

Mr. TRACHTENBERG. No.

Mr. PICKLE. One last question.

On this register, who actually sets this register up, who establishes the register?

Mr. DULLEA. We do. We establish the register. We recruit, and we certify to the various agencies who use the administrative law judges.

Mr. PICKLE. I yield, Mr. Chairman.

Mr. BURKE. Mr. Jones.

Mr. **Jones.** Mr. Trachtenberg, how have black lung ALJ's performed?

Mr. **Trachtenberg.** Generally speaking, admirably, and with integrity, and with very high productivity over the last few months.

Mr. **Jones.** Would you have any objections to grandfathering them in as permanent ALJ's?

Mr. **Trachtenberg.** It is according to what my options are.

I think I would like to take a harder look at them. I have some in the 95 that I would have some serious doubts about in terms of grandfathering them.

Mr. **Jones.** How many would that be?

Mr. **Trachtenberg.** Offhand, I would say probably 15 percent.

Mr. **Jones.** What about your hearing examiners, how have they performed?

Mr. **Trachtenberg.** Many of them have performed very well. They have not reached the productivity levels of the black lung judges. Their area in my opinion is somewhat tougher from the legal and factual standpoint, but I would say 15 percent of those that I would not want to see blanketed in.

Mr. **Jones.** Now, as I understand your compromise, these hearing examiners, the black lung temporary ALJ's would be GS-14's, and this would get rid of the backlog?

Mr. **Trachtenberg.** It would get rid of a portion of the backlog. It would get rid of that portion of the concurrent workload that the SSI hearing examiners cannot hear now.

They cannot hear the concurrent backlog. That represents 17,000 cases.

Mr. **Jones.** Why would you not want to put them as regular ALJ's, because you would not have control over them, or Social Security would not have control over them?

Mr. **Trachtenberg.** I have to defer to the Commissioner on that.

Mr. **Cardwell.** I am not sure I follow the question.

Mr. **Jones.** What seems to be the antagonism from the Civil Service Commission, or the Social Security Administration, to making these people ALJ's, with independence, rather than being the examiners under your direction?

Mr. **Cardwell.** The record shows from the previous testimony, and I think the record also shows in terms of interchanges between HEW and the Civil Service Commission on the matter of ALJ's, that our proposal and ideas have been that we should have one class of hearing officers, and given the fact that the ALJ's were the original hearing officers, that is what we would prefer.

On the other hand, our assignment, as we understood it, was to come back with a solution to the anomaly that resulted from our now having two classes of hearing officers, and that the title XVI hearing officer cannot conduct title II hearings on concurrent claims

The proposal before you represents a compromise between the Social Security Administration and the Civil Service Commission. The Civil Service Commission does not want to see a proliferation of ALJ's in the social security appeals system, or, for that matter, in any other agency, and it would eliminate the anomaly that I spoke of. In addition the proposal would enhance our capacity to utilize that block of the hearing officer staff more effectively. However, you still end up with the two classes.

Mr. JONES. Would you ultimately be driving to get rid of ALJ's in Social Security.

Mr. CARDWELL. There is no ultimate plan to that effect.

The figure seems to suggest that if you adopted this provision and leave things generally alone, we would operate indefinitely with two classes of hearing officers, title XVI officers and ALJ's.

I said in my remarks that I had no objection to it being temporary authority if we understood in advance that eventually you have to come to grips with how you want to deal with concurrent cases over the long run.

I would not find acceptable as a manager of a block of employees to always have a permanent division and how to utilize them. I think it is one that is very arbitrary and it makes no sense from the Social Security Administration's point of view.

We have no broad interest in how the APA applies to the rest of the Government. The Civil Service Commission does, however, and I urge this subcommittee to obtain their views.

Mr. JONES. Why does the Civil Service object to the ALJ's?

Mr. HAMPTON. Mr. Dullea has the history. I would like him to testify.

Mr. DULLEA. There has always been a substantial question about the application of this high-level judicial system of the types of cases handled in Social Security.

The paper I gave Mr. Archer, which has been made a part of the record, speaks to this.

I think of two things that probably we have not paid much attention to, and, if I may, I would like to quote from a study, one of the very critcal studies that led to the enactment of the APA.

This was the study of the Attorney General's Committee on Administrative Procedure, 1941.

I think what they said then probably has relevancy today:

> In the field of benefactions . . . which has broadened with the years, the administrative determinations, though made after a process of adjudication, are obviously not part of any program of control or regulation, but are merely ascertainments of entitlement to Federal gifts.

Included in the latter category were programs dealing with pensions, insurance, compensation, the disbursement of monetary benefits, aid, old-age assistance programs, et cetera.

The other comment I would like to make from the same study goes along the following lines:

> This does not mean, however, that formality is a prerequisite. In cases such as those coming before the Social Security Board, the Veterans Administration, and the Railroad Retirement Board, strict formality would hinder the claimants, who often represent themselves and who should be encouraged to tell their own stories as simply and naturally as possible. There, the atmosphere of sympathetic conversation is best conducive to proper administration. On the other hand, formality is advisable in many contested cases.

Actually, the proceedings before the Social Security Administration are not contests, they are nonadversary.

The Government never appears, and the study recently conducted by the Commission indicates probably 70 percent of the claimants are not represented.

This is a whole different ball game than what applies in an adversary proceeding, in the regulatory agencies, FCC, FTC.

I think it is in that concept, I think the committee can consider these facts in the paper I gave to Mr. Archer.

Mr. **Jones**. Mr. Trachtenberg, you said of those 95 black lung ALJ's, about 15 of them would not be acceptable for permanent ALJ's.

Would all of them be acceptable for the GS-14 hearing examiners to take care of these concurrent cases?

I assume they would be.

Mr. **Trachtenberg**. I think it is a matter of balancing options. The fact that these jobs are temporary in nature tends to give me some hope that maybe with better training and better supervision, they can complete the ultimate standards of an administrative law judge.

I do not feel particularly comfortable with their performance, whether they are an administrative law judge, or a hearing examiner, not subject to the Administrative Procedure Act.

Mr. **Jones**. Just a couple more questions.

Is the Appeals Council doing anything?

Are they doing anything to overturn the ALJ's, or have they kind of gotten the word out, that whatever ALJ's do is fine with them?

Mr. **Trachtenberg**. They are involved very actively. We receive about 30,000 requests for review every year filed by claimants.

I think it is somewhere in the neighborhood of 12 percent of those cases that review is granted. When request for review is granted, about 50 percent of the decisions of the ALJ's are turned around.

Mr. **Jones**. So there has not been any recent activity by the Appeals Council that would indicate whatever is done by ALJ is final?

Mr. **Trachtenberg**. What you may be referring to, Mr. Jones, is the fact that where there is a favorable decision to the claimant, and the agency does not review that decision, that there may be those who feel that there is an action on the part of the Appeals Council to condone favorable decisions to the claimants because they are not reviewed. But even here, we are reviewing, if it is an inexperienced ALJ, even where there is a payment.

Mr. **Jones**. Are you getting along better with the Civil Service Commission than your predecessor, and why?

Mr. **Trachtenberg**. Up to a couple of remarks today, I thought we were. Yes; I think we are.

I think the problem related to an identification of roles, the Civil Service Commission held back on furnishing the earlier requested registers that my predecessor had presented, because it questioned the needs of the agency.

I have serious doubts that the Civil Service Commission can override the agency determination of what it needs in terms of presiding officers.

I think these matters have been resolved, roles have been clarified, and my answer would be, yes, I think there has been considerable improvement in the relations between both agencies.

Mr. **Jones**. You ought to be commended.

I think you have done a good job. A couple of questions I have been requested to ask. Both of you gentlemen seemed to favor section 1-6 of H.R. 8018, but have not stated what are the administrative cost implications of these provisions, how much leadtime would be necessary for such amendments?

Mr. CARDWELL. Could we answer that question for the record?

[The information follows:]

MANPOWER, COST, AND LEADTIME ESTIMATES RELATED TO THE IMPLEMENTATION OF SECS. (1) THROUGH (6) OF H.R. 8018

	Fiscal year—				
	1977	1978	1979	1980	1981
A. Manpower (man-years):					
SSA		−20	−20	−25	−30
State agency	790	810	850	900	950
Net additional manpower	790	790	830	875	920
B. Total net additional costs (in millions)	$19.4	$19.4	$20.3	$21.4	$22.6

C. Leadtime for implementation.—Enactment of these sections of the bill would require from 6 to 12 mos leadtime.

Source: Office of Management and Administration, Social Security Administration, November 5, 1975.

Mr. JONES. And the other is in your pending backlog. Do you count the cases you have remanded back to the State agencies?

Mr. TRACHTENBERG. Yes; they are counted.

Mr. JONES. What would that be?

Mr. CARDWELL. Very small right now, because we are only in the second month on that procedure.

Mr. BURKE. Can you people provide us with a suggested draft which would carry out your proposal?

Mr. CARDWELL. Yes, sir.

Mr. BURKE. For legislation?

Mr. CARDWELL. Yes, sir.

[The information follows:]

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., November 4, 1975.

Hon. JAMES A. BURKE,
Chairman, Subcommittee on Social Security,
Committee on Ways and Means,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This has further reference to the hearings on the backlog of cases in the Social Security Administration at the conclusion of which on October 20, 1975, you asked that the Subcommittee be furnished with draft legislation to effectuate the agreement between the Social Security Administration and the Civil Service Commission concerning Section 3 of H.R. 8911.

Among other things, Section 3 of H.R. 8911, seeks to align the rights of judicial review of claimants under Titles II and XVI of the Social Security Act; it changes the status of personnel appointed under Title XVI; it provides for the appointment of an additional class of Hearing Examiners on a temporary basis through December 31, 1978; and it waives the application to these employees of the restrictions against accelerated promotions in the Whitten Amendment.

As indicated in the Commission's bill report of October 20, 1975, on H.R. 8911, the Commission objects to the personnel provisions of Section 3 which change the nature of the appointment of Supplemental Security Income Hearing Examiners (3(b)), which provide for the appointment of additional Hearing Examiners on a temporary basis and which waive the restrictions contained in the Whitten Amendment against accelerated promotions (3(c)).

In order to achieve the purpose of the agreement between the Social Security Administration and the Commission, viz., administrative flexibility in utilizing over 200 trained Title XVI Hearing Examiners to begin the immediate adjudication of a large number of backlogged cases, it is recommended that Section 3 of H.R. 8911 be deleted and that Section 1631(d)(2) of the Act be amended to authorize the Secretary, until December 31, 1978, to use Hearing Examiners appointed under Title XVI to adjudicate "concurrent" cases. Draft legislation necessary for this purpose is annexed hereto. It is the further opinion of the Commission that the classification of these positions should, on the basis of the level of the work performed, be determined administratively under the provisions of applicable law.

Sincerely yours,

ROBERT E. HAMPTON, *Chairman.*

Enclosure.

SUPPLEMENTAL SECURITY INCOME HEARING EXAMINERS AND JUDICIAL RIGHTS

SEC. 3. (a) Section 1631(c)(3) of the Social Security Act is amended to read as follows:

"(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 205(g) to the same extent as the Secretary's final determination under section 205."

(b) Section 1631(d) of such Act is amended by adding at the end of paragraph (2) thereof the following sentence: The Secretary is authorized until December 31, 1978, to utilize hearing examiners appointed under this section to conduct hearings under subsection (c) which include matters in disagreement involving disability within the meaning of Title II of the Social Security Act.

(c) The amendments made by subsection (a) and subsection (b) shall take effect on the date of enactment of this Act.

PROPOSAL SUBMITTED BY THE ADMINISTRATION

AMENDMENT TO H.R. 8911 TO ALLOW TITLE XVI HEARING EXAMINERS TO HEAR CONCURRENT TITLE II ISSUES

On page 2, strike all that follows after line 2, down to and including line 17 on page 4, and insert in lieu thereof the following:

"SUPPLEMENTAL SECURITY INCOME HEARING EXAMINERS AUTHORIZED TO HEAR CONCURRENT OASDI CASES

"SEC. 3. Section 1631(d)(2) of the Social Security Act is amended by adding after the period at the end, "To the extent that the Secretary finds it will promote the objectives of title II, in the case of any claimant under this title who is also claiming benefits under title II, the Secretary may provide for a hearing examiner appointed under this paragraph to conduct a hearing under title II with respect to any matter arising in the course of a hearing held prior to January 1, 1979, under this title that may be subject to a hearing under title II with respect to that claimant."

Mr. BURKE. What answer would you give on the House floor, if there were about 100 Members worked up about this problem, and they ask about this backlog, which is now down to 106,000 cases? What answer would you give on the House floor to those Members who will make this inquiry, what will the backlog be 12 months from now, what will it be 18 months from now?

Mr. CARDWELL. A year from now?

Mr. BURKE. Yes.

Mr. TRACHTENBERG. A year from now, it will be in the area of about 75,000.

Mr. BURKE. A year from now?

Mr. STEIGER. If you do only what you recommended.

Mr. CARDWELL. And all of the other things within our administrative budget.

Mr. BURKE. Any further questions?

Mr. CARDWELL. I think it is a difficult question to answer, as difficult for you as it is for us to answer. It is hard to answer how such an agency with such large resources cannot solve a problem like this through sheer determination, but we would be glad to give you our best statement for your use on the floor with regard to where we are, where we have been, what it was like a year ago, and what it was like 2 years ago. I think you will find it will be better a year from now.

The only other choice we have would be a blanketing-in movement, and that would be a very difficult precedent to turn to.

I am not sure that serves the interest of due process for society or the claimants as a whole.

Mr. BURKE. All right.

That completes the hearing.

Thank you very much for your appearance.

[The following was submitted for the record:]

STATEMENT OF THE HON. MAX BAUCUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

The history of enactment and gradual expansion of Social Security and SSI benefits is especially important to Americans presently affected by our current recession. These programs are all or most of what many Americans live on each month.

However, these programs do no good for people who are denied benefits—either because the Social Security Administration has failed to get their checks out or because the appeals process on adverse claims is bogged down. I think it is essential as this Committee looks into the problems of the Social Security Administration that each of you on the Committee remains continually aware of how these administrative problems translate into individual agony on the part of those who are denied their benefits.

Social Security Administration spokesmen blame the tremendous backlog in disability appeals primarily on two factors: (a) the rapid growth in caseload caused by the black lung benefits and the SSI programs, and (b) a general increased public awareness of Social Security benefits. The Administrative Law Judges Association lays the blame on a third factor—bureaucratic inefficiency within the Social Security Administration.

While I cannot presume to understand all of the problems within the Social Security Administration, some facts are clear:

First, as the Ways and Means Committee staff pointed out in its July 1974 report, the current determination appeals process, with its many complex levels of state and federal procedure is both time-consuming and shows a high reversal rate.

Secondly, there is a considerable amount of dissension and turmoil within the Social Security Administration. The fight going on between the administrative law judges and the administration of the agency in itself suggests that the agency is not functioning as well as it should be.

Thirdly, the most optimistic projections show the appeals delay problem getting worse, not better.

Eight years ago, the average processing time for hearing decisions was 93 days. By the end of last year, this had increased to 213 days. The most recent figure I've been able to get from the Social Security Administration is for mid-August of this year. It shows the average processing time for hearing decisions to have jumped to 223 days.

As of August 16, I understand there were approximately 1,230 disability cases pending for hearing in the Denver regional office, which serves my district in Montana as well as five other states in the area.

Further, the present backlog in the administrative process is being passed on to the judiciary as more and more cases are being appealed in court. At the end of last year, 4,409 denied social security claimants had cases pending in the nation's courts. By September 13, 1975, this number had more than doubled to 9,095.

Commissioner Cardwell has told the Labor-HEW Subcommittee of Appropriations, "I don't want to paint too rosy a picture about (the Social Security Administration's) ability to get the hearings problem behind us in a short time. We (at the SSA) hope to be out of the woods in the black lung program by the end of fiscal year 1976 and in the other programs about a year later, but there is no guarantee."

Frankly, even if achieved, Mr. Cardwell's target is too long for those who, in the interim, are denied benefits.

As Congress looks into these problems, one must not forget that Congress and the General Accounting Office have previously urged the Social Security Administration to improve its procedures, but the Administration has felt free to ignore these suggestions.

The Committee is aware of the 1959 GAO recommendation, ignored by the Social Security Administration, that the Administration study the present "Federal-State" apparatus for its efficiency and report back to the Congress.

Further, the Administration in 1972 changed its policy of 100% review of state allowances to a small sample approach—a step which is only questionably allowable within the legislative directive for the Secretary of Health, Education and Welfare to "review and revise determination of State agencies" for uniformity and program savings. At the same time, as you'll note from the chart below, the Congress has gone along with SSA's requests for increased personnel to handle these problems.

	Positions					
	President's budget request			Congressional action		
Fiscal year	Permanent[1]	Temporary and part time	Total	Permanent	Temporary and part time	Total
1972	53,793	1,804	55,597	53,793	1,804	55,597
1973	64,686	3,654	68,340	64,686	3,654	68,340
1974	70,742	6,020	76,762	70,742	6,020	76,762
1975	73,378	3,500	76,878	73,378	3,500	76,878
1975 with supplemental	79,372	7,276	86,648	(2)	(2)	(2)
1976	79,372	7,276	86,648	(2)	(2)	(2)

[1] Fiscal year 1975 budget (with supplemental) and fiscal year 1976 budget includes term positions for employees who will be on board for more than 1 yr but are not expected to become permanent additions to the Federal work force.

[2] Pending in Congress.

With this by way of introduction, I would like to identify three areas where I think improvements in the existing claims process can be made:

I. REDEFINITION OF DISABILITY

First, I think it important, in the long run, that Congress reconsider the definition of "disability":

Partial Disability

Under existing law, a person is considered legally disabled only when he or she is *totally* unable to produce work in *any* kind of employment. This fosters a great degree of subjectivity in judging whether a claimant is eligible for benefits. It is also irrational in that it creates two "all or nothing" situations.

First, it assumes that a person is either totally disabled or that he is not disabled at all. Workman's compensation law and Veterans' Administration disability have recognized that this need not be true. I suggest that in the long run, Congress might be wise to allow partial disability determinations for SSA programs.

Occupational Disability

The present definition assumes that a person is not legally disabled if he is not disabled to the extent that he cannot work in all possible occupations. This, again, is irrational. A person who has worked and trained all of his life in one occupation, and is disabled so as to not be able to continue in that occupation, should be classified as legally "disabled."

The whole idea of vocational rehabilitation rests on the assumption that disabled people can be retrained into productive employment. Instead of the current definition of "disability," I recommend that Congress adopt a new one that would judge people disabled if they no longer can work in their own or a related vocational field.

Let me cite a hypothetical example of a person who has applied for disability benefits. This example, by the way, is taken from a composite of several "case" inquiries I have had in my office.

The claimant suffers from recurring and severe back pains. He also has chronic breathing problems. Both of these problems stem from industrial jobs he has held. Now he is able to and does work two days a week as a cook in a cafeteria. If he works any more than this, he becomes exceedingly tired to the point of occasionally requiring hospitalization.

Is this person *totally* disabled? Can it be truthfully said that he is unable to work in *any* occupation? If these kinds of claimants were granted occupational disabilities or even partial disabilities, I believe there would be a dramatic reduction in appeals.

II. PROCEDURAL PROBLEMS

The second problem with disability determination stems from the complex procedures used to determine eligibility benefits.

In discussing these procedures, I hesitate to start with the battle being waged over the workability of the Administrative Procedure Act when it relates to Social Security appeals. Frankly, I consider the administrative law judge controversy to be a side issue, important only to the extent that a clear Congressional decision of A.P.A. applicability in Social Security decision making is instrumental in getting rid of the current administrative mess.

Briefly, I consider the A.P.A. to be important in safeguarding the rights of all Social Security claimants—and I'd hate to see the Congress allow the merits of expediency to overrule the equally important merits of due process. Rather than getting rid of A.P.A. procedures and independent judges from disability determinations and allowing less independent hearing examiners from within the Social Security Administration to expand their present jurisdiction into the disability area, I would require SSI and all other appellate determinations to be made by independent judges under the A.P.A.

But too much of the present controversy has been wound up in prolonged discussions of the applicability of A.P.A. procedures. I think the Committee would be wrong to let the A.P.A. "tree" obscure the view of the disability "forest."

Commissioner Cardwell and others have pointed out a long list of other important procedural problems within the disability program. I think the most important of these are as follows:

(1) "Buck-passing" between appellate lawyers: The current multi-leveled appellate procedures essentially shifts the responsibility to make determinations from one official to another. Computerized initial determinations, paper reconsiderations, and the field/regional/national office arrangement are three factors which dehumanizes and shifts responsibility with the system. This causes a high number of appeals and a high number of reversals. I am convinced that by thoroughly investigating each individual claim—before the hearings level, and with clear accountability—the backlog problem will diminish appreciably.

(2) No reasons for denials: Claimants are allowed neither a clear statement of the reasons for claims denials nor are they given an immediate opportunity to discuss a denial. When claimants receive denials of their claims (which are little more than a computer-produced postcard), they are faced with two choices—forget about their claim or ask for reconsideration. If they ask for reconsideration, they do so as a Social Security number as it were, pleading their cause with a computer.

Two corrective steps should be taken: The original denials should explain why claims are denied. Then, if claimants request reconsideration, they should be entitled a face-to-face meeting with a claims investigator.

Criticisms of Some Recommeneded Changes

I am at the same time leary of several procedural changes which have been suggested for speeding up the system.

I do not think it necessary to exclude the states from their present role in the determination process as some have suggested. Shifting any determination from existing state apparatus to the federal government may have some benefits but I believe the problems associated with such a change would outweight any advantages.

I appreciate the Social Security Administration's experimentation with the concept of "informal remand." However, I think it unwise to decrease hearing delays by increasing investigative delays. If, at the investigative level, the steps I have suggested are implemented, the new delays caused by remands should be avoided.

Another poor suggestion is to decrease the amount of time claimants are allowed to file appeals and requests for reconsideration. This suggested change would decrease appellate caseloads by artificially restricting those who may appeal. This doesn't make sense. Certainly, there must be a "statute of limitations" for appeals, but its purpose should not be to eliminate meritorious cases. Using that rationale, we might get rid of the whole backlog by limiting claimants to 24 hours for appeals.

III. PERSONNEL PROBLEMS

A third problem is one of budget and personnel. To the extent that the various reforms mentioned so far require additional personnel to be implemented, Congress should provide these personnel.

As necessary, we should expend the number of state or federal investigators at the reconsideration level sufficiently. The cost of such an expansion would be offset partially by the savings caused by fewer cases advancing to the hearings level.

Pending Legislation

I have discussed several ways to improve the delay situation by getting at its causes. However, another proposal which merits special attention is to establish deadlines for Social Security Administration performances—deadlines accompanied by good self-enforcement provisions. I have co-sponsored legislation before this Committee to do this because I think it is the most speedy way to prompt SSA to cure itself. The examples I pointed out earlier of the Administrations tendency to ignore GAO and Congress demonstrate the necessity of this kind of approach.

Basically, this approach would mandate the Administration either to eliminate the unconscionable delays in its decision making, or to pay benefits to the claimant.

There are good points to each of the bills before the Committee that would accomplish this, and rather than explore each of the bills, I will outline what I think a final version should contain:

(1) The Social Security Administration should be given time limitations for each step of its appeals process. While any stipulated time limit to complete each step in the process may be arbitrarily set, I would still prefer such a limitation to language such as "within a reasonable period of time." Section 3 of Congressman Seiberling's bill, H.R. 9921, tackles the problem in this way and I urge its adoption with the following exception: The time limits suggested in this section are much too liberal. When the maximum times allowed for each step in H.R. 9921 are added together, they total 420 days—over a year. I don't think we would ask too much of the Social Security Administration to cut this total in half—especially if this were implemented in graduated steps.

(2) Mandatory time limitations should apply to every kind of Social Security claim. While disability claims account for the great majority of delay problems, there is no reason that one category of benefits should be treated differently from any others. I think the Committee is aware of the class distinction overtones inherent in differentiating in any way between the way SSI claims (more often claims of the less privileged) and disability claims are handled.

(3) Finally, I think any good legislative reforms should go beyond the disability problem and get into the problem of late, lost or stolen checks.

One of the more frustrating aspects of Congressional casework, as I'm sure you are well aware, is that frequent occurrance of a missing benefit check. Assuming that on the first day the Social Security Administration is contacted, it admits that there is a missing check to which the beneficiary is entitled—and that is quite an assumption—still there can be a several weeks delay while the Social Security's computors talk to the Treasury's computers, authorizations are requested and disbursement is made.

Remembering that individuals who receive Social Security benefits are often dependent on their monthly check to keep their heat turned on and food in the house, and knowing that often, before any complaint is made about a late check, and individual has patiently waited for a couple of weeks for the late check to arrive, I think it is important that once he does complain, he is presumed to be entitled to a replacement check immediately. If necessary, I would advocate keeping special emergency accounts in local Social Security offices to handle this problem.

Mr. Chairman, this concludes my testimony, and I appreciate the Committee providing this opportunity to present these remarks.

STATEMENT OF HON. JOHN B. BRECKINRIDGE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY

Mr. Chairman and fellow Congressmen, I have requested this time before your Committee to acquaint you with certain observations relating to what I feel are necessary legal and administrative changes under the Title II and Title XVI sections of the Social Security Act.

According to Commissioner Cardwell's testimony before this Committee on September 19, there are now a total of approximately 106,669 hearings pending before the Social Security Administration. Of this number I understand that 52,749 relate to Disability Cases under Title II of the Act; approximately 16,781 remain as Black Lung residue, not transferred to the Labor Department; 34,301 are Supplemental Security Income program cases under Title XVI of the Act; 1,684 relate to Retirement and Survivors Insurance; and, Medicare hospital cases number 1,154.

Available to handle hearings for this backlog of roughly 107,000 cases are the 3,200 full-time employees of the Bureau of Hearings and Appeals in Arlington. Of this total number of employees, which includes non-professional staff support, are 436 Administrative Law Judges, qualified under 5 U.S.C. Sec. 3105 of the Administrative Procedures Act and certified by the Civil Service Commission. These Judges hold a G.S. 15 rating. I am told that 124 hearing examiners, *not* certified by the Civil Service Commission under 5 U.S.C. Sec. 3105, are employed to hear Supplementary Security Income cases, and that 95 *temporary* Administrative Law Judges—who have applied to the Civil Service Commission for certification and hold Grade 14—have been retained to hear the remaining Black Lung cases.

Considering, for a moment, the total backlog caseload to be handled by the current professional staff now deployed on a nationwide basis—the caseload averages out at approximately 179 cases per Administrative Law Judge or hearing examiner. It is my further understanding that Administrative Law Judges average on a nationwide basis hearing 20 cases per month while deciding finally 17. On this basis, it would take 9 months at least for the present professional staff to catch up with the present backlog, *if* such personnel could be deployed on a rotating basis between the areas where the caseloads are the heaviest.

As explained by Commissioner Cardwell in his testimony, this heavy backlog has been due to the large volume of Black Lung hearing requests originating during 1973, 1974 and 1975 (a total of 70,500). Applicants Disability Benefits requests, I am also advised, have increased at an annual rate, from 780,000 in 1970 to 1.3 million in 1975, and are expected to reach 2 million in 1976.

However, once the black lung case backlog is removed from the Social Security Administration, with the assistance of the 95 temporary Black Lung Administrative Law Judges, a part of the current nine-month backlog will have been permanently removed. There will then remain outstanding a hearing backlog of 90,219 cases. At the average hearing rate of 20 cases per month, that backlog will be reduced from 9 to 7 months. If SSI hearing examiners were not restricted to hearing only SSI cases under Title XVI, and Black Lung Judges were not restricted to Black Lung cases alone, this backlog could be significantly reduced commencing immediately. Even then, if all of the 95 Black Lung, Grade 14, Administrative Law Judges should qualify as SSI Administrative Law Judges or Hearing Examiners when the Black Lung backlog is completed, this would only provide a total professional staff to hear SSI cases of 219 Hearing Examiners. These 219 Hearing Examiners would have a hearing load at present of 34,301 cases, or an average of 157 cases per Examiner. This creates a backlog of 157 cases per Examiner approximately, or a 7-month backlog.

Of these cases, 16,459 are straight SSI cases, to be heard by Hearing Examiners, with the remaining 17,842 concurrent cases (claims involving disability as well as SSI) having to be heard by Administrative Law Judges, because of the present restrictions forbidding Hearing Examiners to hear concurrent cases.

As you can see, the hearing backlog is very heavy for Administrative Law Judges as they hear Medicare, Retirement and Survivors Insurance appeals, SSI, Black Lung, and Disability case appears. At present, there are 55,587 hearings to be heard by the 436 Administrative Law Judges. This gives each Administrative Law Judge a caseload of approximately 170 cases, or an 8-month backlog, not counting the 49 average caseload per Administrative Law Judge caused by the 17,842 concurrent SSI caseload. If the Black Lung Judges could qualify soon as Administrative Law Judges, these 95 judges could ease the concurrent caseload now placed as an added burden on the present Administrative Law Judges as well as hearing additional Disability, Medicare and Retirement and Survivors Insurance appeals.

Although the current birth rate is declining, the Administration will still have to pay future benefits to an expanded population born in post Depression or World War II, whose life span most certainly may be greater than that of previous generations. It would, therefore, be reasonable to assume that the Social Security Administration will have to expand its programs, including hearing officers, if it is to accommodate the benefits due these people on a timely basis.

The Committee is now considering a bill, H.R. 8018, which attempts, among other goals, to streamline the current appeals practices now employed by the Social Security Administration in claims under Title II of the Social Security Act. As you know, the present time frame for processing claims is cumbersome and, in my estimation, unduly lengthy. If the best interests of the claimants were truly being served by such a lengthy process, it would be justifiable, but it is submitted that this is not the case. After a claim is filed, it takes an average of 85 calendar days for the initial decision to be reached by Social Security officials. The claimant then has six months in which to file a request for reconsideration of the claim—an unnecessarily lengthy period of time, considering the fact that roughly two-thirds of the claimants' file for reconsideration within 60 days. The Social Security Administration then averages approximately 72 calendar days in reviewing these cases under Petitions for Reconsideration. At this point in the proceedings claimants have no opportunity to present additional medical information, though obviously his medical condition may have deteriorated appreciably (over an 8–9 month period), or the opportunity to discuss his case personally with the Examiner. There is, at present, no specific time limit imposed upon the Examiners in which they must respond to the claimant's Petition for Reconsideration. After claimant's request for reconsideration has been decided, he has six months in which to request a hearing before an Administrative Law Judge and, again, no time limit is imposed upon the Administrative Law Judge in which he must schedule a hearing; when finally scheduled claimants are given only ten days notice in which to prepare and appear, and be heard. After these unconscionable delays and ofttime consanguine changes in condition.

Administrative Law Judges under these procedures, are burdened with determining after such extended periods of time-whether a claimant's medical condition was deteriorated, by having to review such old and new medical and other evidence as may be adduced as a result of the time frame lag provided on appeals. This is additional work which should not have to be imposed upon an Administrative Law Judge, and it makes his adjudication more difficult. Claimants, because of the short notice provided for hearings, are not always able to provide the necessary medical evidence to result in a proper evaluation of their case. It is also fair to say that the form notice, as often as not, serves the purpose of confusing rather than enlightening the claimant who is needy, often old and unlettered and without counsel. Among my own constituents, I have found it necessary to make a particular effort to bring to their attention the necessary of current, adequate and updated medical evidence at these hearings. This has resulted in the speedy closures of 52 cases, including twenty two disability cases which were 18 months to 2 years old, with withheld benefits totaling $82,000.00; the thirty newer cases, about a year old, resulted in payments of about $1,000.00 each. This casework was handled on a one-to-one basis, being marked *Urgent* by my District Office staff working in concert with the local Social Security office.

It is also important to note that 51% of the cases reviewed by Administrative Law Judges result in reversals of the initial decisions, and that 13% of the cases reviewed by the Social Security Administration's Appeals Council are reversed. The U.S. District Courts will review some 7,000 Social Security Disability appeal cases filed this year and, if their past reversal rate holds up, about forty (40%) percent of the cases reaching them will be reversed.

Surely the figures before us attest to the urgent need for administrative and legal procedural changes in a system which now takes an average of 15 to 24 months to process a claim for our elderly citizens—whose need for timely action on their claims requires no further exposition by me; such delay is unconscionable and totally destructive of the rights of our neediest citizens.

The Social Security Administration is administering a benefactory program—not an adversary proceeding versus the claimant. It is the Agency's responsibility to assist people in obtaining the benefits accorded them under the law, not to frustrate them. Our disabled and elderly citizens should, and the necessity for civil action to receive those benefits to which they are initially entitled. The above cited appellate delay and reversal record would be appalling under any circumstances—it is inconceivable that the Congress could tolerate the continuation of this calloused treatment and denial of the rights of our elderly needy.

In August of this year the Lexington Kentucky Herald reported that our local Social Security office had the worst backlog in the Nation—942 cases—and that many of those eligible for benefits had been waiting a year or more for a hearing. The Regional Chief Judge of the Bureau of Hearings and Appeals advised that he would reassign 635 of these cases to hearing officers in other States, and that the Judges would travel to Lexington in September to hear the cases. The cases were to be assigned to judges sitting in the Carolinas, Tennessee, and Georgia, and a number of disabled people whose cases were already 18 months to two years old would have had to travel to those states for hearings. My District Office was subsequently advised, however, that claimants would not be required to travel more than 75 miles for a hearing. However, we have been advised by consituents, in the past that they have had to travel to adjacent states for such hearings.

It is my understanding that in several instances a few of these old cases have been thrown out either for lack of information at the hearings or because of the inability of the claimant to either travel long distances to a hearing or to accumulate, on short notice, the information needed to butress their claims.

Severe administrative problems apparently exist, at present, in the Social Security Administration's effort to achieve equitable distribution of qualified Administrative Law Judges and Hearing Examiners in relation to caseload distribution. Regional offices such as Chicago, Philadelphia, and Atlanta carry the heaviest caseloads. Other areas of the country are assigned caseloads up to 50 percent less per Administrative Law Judge or Hearing Examiner. Personnel are not now as efficiently assigned as they could be, in proportions relative to the existing caseload distribution. Thus, in areas where the caseload is 50% lighter, there may be more than enough Administrative Law Judges and Hearing Examiners assigned, than the caseload would require. Conversely, areas which carry the heaviest appeal workloads, may not have a sufficient number of Administrative Law Judges and Hearing Examiners assigned or rotated to assist in clearing up the backlogs. The current restrictions placed on SSI Hearing Examiners to only hear SSI cases and Black Lung Judges to only hear Black Lung cases further compounds the problem of obtaining qualified personnel to help erase the current backlog.

Additional Hearing Examiners who may be assigned to help ease the backlog are limited in the assistance they can render Administrative Law Judges because of their inability to hear anything but SSI cases or Black Lung Cases. This places the burden for hearing all types of Social Security appeal cases too heavily on the present Administrative Law Judges. There are not sufficient Administrative Law Judges available now, even if a full rotation program of Administrative Law Judges and Hearing Examiners was implemented immediately, to help erase the current backlog.

Clearly, this distribution of personnel and caseload must be examined closely to see what improvements can be made if claimants best interests are to be served.

In 1970 Old Age and Survivors claims totalled 3,567,400; Workers and Dependants Disability claims totalled 1,152,200; and Medicare claims totalled 61 million.

In 1975, Od Age and Survivors claims total to date, 3,951,600; Workers and Dependants Disability claims 1.841.200; SSI and Old Age, Blind and Disabled 1,632.000, making a total of 7,430,900 claims, excluding Medicare. Medicare claims for 1975 are 107,900,000 or approximately double the 1970 figures on an annual basis. There has been a growth rate in Social Security disability cases alone of 89,000 annually between 1970 and 1975. I cite these figures to emphasize the increased programmatic administrative burden placed upon the Social Security

Administration, its Administrative Law Judges and Hearing Examiners, over the past five years.

Additionally, 561,000 black lung cases were filed between 1970 and 1975.

I believe that H.R. 8018 contains many provisions which will contribute to the alleviation of some of the current appeal time-frame problems. The bill amends Section 205, Title II of the Social Security Act, to provide that qualified individuals, who show in writing that their rights may be prejudiced by any initial decision by the Secretary of H.E.W., has the right to reasonable notice and opportunity for reconsideration of such initial decision. The request for reconsideration entitles the claimant to an informal conference in advance of a formal hearing, to present views and documentary evidence, including medical. The Secretary must submit a Reconsideration Decision within 90 days of the filing of the request for reconsideration. If the Secretary affirms the initial decision, he must so advise the claimant in writing, including a detailed statement of the case, and the claimant may thereafter within 30 days file for a formal hearing. Hearings held pursuant to these provisions would conform to the requirements of 5 U.S.C., Secs. 554–557, the adjudications provisions of the Administrative Procedures Act, and the Secretary is *required* to appoint Administrative Law Judges, in accordance with the provisions of 5 U.S.C., Sec. 3105, which provides that each Agency shall appoint as many as are necessary for proceedings required to be conducted in accordance with 5 U.S.C. Sec. 566 and 557 of the Administrative Procedure Act. Administrative Law Judges are to be assigned to cases in rotation, as far as practicable, and may not perform duties inconsistent with their duties and responsibilities as Administrative Law Judges. H.R. 8018 would further provide that Administrative Law Judges be classified as a grade not lower that GS–16.

The Bureau of Disability Insurance of the Social Security Administration is currently conducting a pilot program in three states, which provides claimants with appeal reconsideration hearings similar to those provided in H.R. 8018, and it reportedly has been successful in helping to screen out those cases which might subsequently have been unnecessarily assigned to Administrative Law Judges.

The virtues of H.R. 8018 lie in its provisions streamlining the present appeals procedures under Title II of the Social Security Act, by giving claimants the benefit of the timely adjudication which is required under the provisions of the Administrative Procedures Act.

Title XVI of the Social Security Act has been so drafted as to provide claimants with a more speedy time frame for the processing of their appeals. Currently, appeals taken by claimants under Title XVI of the Social Security Act, relating to Supplemental Security Income benefits, are filed within thirty days after notice of such determination is received. Determination on the basis of such a hearing is made within 90 days after the individual requests a hearing, with an exception for cases involving disability claims (concurrent cases). Final determination of the Secretary after a hearing is subject to judicial review, as provided in Section 205(g) of Title II of the Social Security Act, to the same extent as the Secretary's final determination under Section 205. Certainly, Title II of the Act should be amended to provide a quicker processing time for appeals, than the current 18 months to two year average for finalizing a claim.

There is one provision, however, which now exists in Title XVI of the Social Security Act relating to judicial review by claimants, which I feel should be changed. Another bill, H.R. 8911, which will be discussed at these hearings, deals with this particular provision to which I object. Section 3 of H.R. 8911 would amend Section 1631(d) of Title XVI of the Act to provide that a final determination by the Secretary in regard to a claimant's appeal is subject to judicial review to the same extent as the present section 205(g) of Title II of the Social Security Act. This section of Title II provides that claimants can appeal the Secretary's findings of fact. Section 1631(d) of Title XVI only provides claimants with judicial review on the basis of the rule, and not on findings of fact. Let me state that, on the basis of my office's experience, I feel that the present statute, which denies SSI recipients the right of appeal to the U.S. District Court on findings of fact by the Secretary, is prejudicially unfair. I would, therefore, support the provisions of H.R. 8911 which would give SSI claimants the right to such judicial review.

Other sections of H.R. 8911 deal with qualifications for Hearings Examiners under Title XVI of the Social Security Act. These sections have been designed to provide the Secretary of HEW with greater leverage in appointing SSI Hearing Examiners, who may not qualify as Administrative Law Judges under Sec. 3105 of Title 5 of the Administrative Procedures Act. Section 3(c) of H.R. 8911 would allow the Secretary of HEW to recruit, select and appoint persons as Hearing Examiners, even if such hearing examiners do not meet the requirements for Administrative Law Judges appointed pursuant to 5 U.S.C., Sec. 3105 of the United States Code. Such appointments are to terminate not later than December 31, 1978. The purpose of this provision is to establish a roster of Hearing Examiners sufficiently large to handle the volume of cases anticipated under Title XVI—a roster larger than that of persons qualified as Social Security Administrative Law Judges.

It is my understanding that this was intended in drafting the existing provisions of the Title XVI law, but failed because of a drafting error which erroneously exempted the proposed Examiners from the standards of subchapter II of chapter 5 of Title 5, U.S.C., instead of from sec. 3105 of Title 5 of the Administrative Procedure Act. As a result, the Civil Service Commission, acting on "the face of the law" in the discharge of their responsibility to prescribe qualifications for Administrative Law Judges refused to supply the Secretary of HEW with a register of potential Administrative Law Judges on the grounds that section 1631(d) does not require hearings to be held under the provisions of the Administrative Procedure Act, and the Commission is, therefore, without jurisdiction to establish such a register. A basic conflict between Social Security Hearing Examiners and Administrative Law Judges, as a class, has been created by these differing standards and qualifications. It is apparent that there are at present neither Administrative Law Judges, nor Social Security Hearing Examiners, in sufficient quantity to dispose of the outstanding backlog. The professionalization of the adjudication of constituents claims would best be served by the necessary increase in the number of qualified Administrative Law Judges, including certification thereto by the Civil Service Commission of those Civil Service Commission Hearing Examiners having the necessary qualification. This, however will obviously not enlarge the number of hearings processed, which pending the establishment of the necessary number of Administrative Law Judges, it would appear necessary to continue the Hearing Examiner system. The Hearing Examiner system in addition to being augmented numerically should have its jurisdiction authority enlarged to include all of the Social Security cases i.e., black lung, Medicare, Retirement and Survivors Insurance, and Disability appeals on a temporary basis.

One administrative difficulty which has arisen out of the preesnt dual qualification standards for Administrative Law Judges and Hearing Examiners under Titles II and XVI of the Social Security Act, respectively, is the restrictions imposed on Hearing Examiners under Title XVI, that do not apply to Administrative Law Judges. The fact that SSI Hearing Examiners can hear only SSI cases, and that Black Lung Administrative Law Judges can hear only Black Lung cases, severely limits their ability to dispose of the current backlog. Because of this heavy backlog, the Secretary has made an effort to train those temporary, Grade 14, Hearing Examiners, now hearing Black Lung cases, to hear SSI cases in the future. These Examiners have six years experience, and it is the opinion of the Board of Hearings and Appeals that all 95 will be qualified for certification by the Civil Service Commission as Administrative Law Judges with one more year's experience. However, the Civil Service Commission may not feel in the proper exercise of its discretion, that these Judges meet their standards. Only 4 Black Lung judges are on the Civil Service Commission roster as qualified at the preesnt time. As all the Hearing Examiners now employed by the Bureau of Hearings and Appeals are Grade 13, requiring four years' administrative experience, only 5 Hearing Examiners are on the Civil Service Commission's roster as being certified as Administrative Law Judges.

It is quite clear, however, that at present employment levels, 436 Administrative Law Judges, 124 Hearing Examiners for SSI cases, and 95 temporary Black Lung Judges, who may or may not eventually qualify as Administrative Law Judges, are not going to be able to reduce the existing nine-months backlog or the anticipated future 7–8 month backlog.

In order to correct the present situation, administrative and legislative steps need to be taken to: (1) employ additional Administrative Law Judges and/or hearing examiners; (2) enlarge the jurisdiction of Hearing Examiners' to include all types of Social Security appeals cases, bearing in mind that their qualifications can be reviewed at any time for certification as Administrative Law Judges; (3) provide for a better distribution, nationally, of both temporary and permanently assigned Administrative Law Judges and Hearing Examiners to relieve the existing current caseload distribution inequities; and (4) foster, financially and administratively, a program whereby Hearing Examiners can eventually qualify by special training for consideration and certification as Administrative Law Judges by the Civil Service Commission.

I would also like to recommend, particularly, that the Subcommittee on Social Security undertake a study relating to current Civil Service Commission regulations pertaining to the certification of Administrative Law Judges and the assignment of grades thereto. I feel such a study would be valuable in assessing the qualifications of applicants who may have sufficient experience to become efficient and well qualified Administrative Law Judges, but who may not meet the present Civil Service Commission qualifications.

The Congress certainly cannot allow claimants for beenfits to which they are entitled to suffer endless delay because of an administrative failure on the part of the Federal government to solve its administrative, procedural and personnel problems pertaining to the Social Security program.

I would respectfully recommend to the Ways and Means Subcommittee on Social Security consideration of these goals in the implementation of any legislation reported out by the Committee to help correct the current problems of the Social Security Administration in efficiently administering the claims programs now under its jurisdiction, particularly under Titles II and XVI of the Social Security Act.

STATEMENT OF HON. JAMES T. BROYHILL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, I appreciate having this opportunity to testify before the Social Security Subcommittee regarding needed changes in the Social Security system to expedite the consideration of claims for benefits.

As you know, the Social Security Administration has established a procedure for a claimant to follow if his or her claim for benefits has been denied. However, I think it is time for Congress to take a look at this procedure and consider setting up a procedure by law which will not only provide for quicker and faster consideration of claims, but will give claimants assurances that their claims will be heard, as well as certain rights to advice and assistance.

The present appeals procedure specified that the applicant has a certain amount of time in which to request each step in the claims proceedings: six months to request reconsideration; six months to request a hearing before an Administrative Law Judge; 60 days to request a review by the Appeals Council. It is interesting to note that while there are definite time limits imposed on the claimant, there are no time limits imposed on the Social Security Administration to complete action on any of the claims.

This process obviously results in lengthy delays before a potential recipient receives a final determination on his claim. In going through my files, I found numerous examples of unnecessary delays. One man requested a hearing on August 30, 1974; his hearing was finally held on August 28, 1975, and he still has not received a final decision. A woman requested a hearing in December 1974; as of October 1975, her request for a hearing is still pending. These are but two examples from my files, but practically every case in my files shows similar situations occurring. Other Congressmen have like experiences to recount.

I propose, Mr. Chairman, that the Congress take the necessary steps to correct this problem. I suggest, first, that we shorten the length of time in which an applicant may request a reconsideration to 60 days from the date of the notice of the adverse initial decision. In addition, I propose that we allow only 60 days for a claimant to file a formal request for a hearing. It seems to me that the longer periods of time that are in effect now are not necessarily in the best interest of the claimant, inasmuch as it gives the practical effect of extending the total length of time that the claim in under consideration. It would be in the best interest of the claimant to give faster action on his or her claim.

Most importantly, however, there needs to be some requirement that the Social Security Administration must make a determination within a reasonable period of time. I have selected a period of 90 days. Perhaps the Committee might wish to select some other reasonable time period. In any case, however, it should be a specified time limit in which the Social Security Administration must take action and make a final determination.

Obviously, these changes would shorten the extensive time lag in the appeals process and enable the ultimate determination of an appeal to be rendered much sooner.

I also believe that the Congress should provide for a personal conference between the claimant and a representative of the Social Security Administration before a case reaches the hearing stage. At a personal conference, the claimant can be given advice on how best to document his or her claim, can be assisted in gathering additional information, and can be told exactly on what grounds the claim was denied.

I am convinced that the Congress must take expeditious action to eliminate these inordinate delays in the appeals process for social security benefits claims. Therefore, I hope the Subcommittee will give favorable consideration to these suggestions.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., September 24, 1975.

Hon. JAMES A. BURKE,
Chairman, Social Security Subcommittee,
Ways and Means Committee, Washington, D.C.

DEAR MR. CHAIRMAN: I would like to take this opportunity to commend you for the action you have taken in scheduling hearings on the subject of delays in the social security appeals process. I appreciate the opportunity to submit a statement for the record on this important subject.

Since coming to Congress I have had many residents of the 8th district of Wisconsin contact me for assistance in getting a date for their disability hearings. I currently have six constituents who are waiting for a hearing by an administrative law judge so that their eligibility for disability benefits can be determined. These people have been waiting for four to six months for their hearings, and I am certain you can understand the frustrations and financial hardships the delays have caused them.

A case in point is that of a women from Antigo, Wisconsin. One year after the onset of her disability which forced her to cease working, she filed an appeal with her local social security office. The date of this application was February, 1975. My last report on the status of her appeal was received from the Administrative Law Judge in charge of the Milwaukee Social Security Hearing Office on July 31st. I was notified that "every effort is being made to insure that her hearing is held at the earliest possible opportunity." I hardly call a six month wait the earliest possible opportunity. The case has still not been assigned to an administrative law judge.

Another case which demonstrates the problems created by these delays is that of a farmer from Shiocton, Wisconsin. He is 48 years old and was disabled as a result of a farm accident in which he lost the use of his right hand. Although he is currently in the process of receiving physical therapy, the treatment has not been effective in helping him regain the loss he suffered to his hand.

The accident forced this constituent to sell his entire dairy herd and therefore forego his livelihood. Because he has six dependent children to support, this man even tried to obtain rehabilitation help from the state, in an effort to train for a different occupation. He was advised that no funds for this purpose were available.

My constituent's doctor sent statements attesting to his disability and to the fact that it would last from one to one and one-half years. Neverheless, this man was denied disability benefits upon appeal in February. In March, I requested further consideration on his behalf, and I have since learned that the request for a hearing is pending before the Milwaukee Social Security Hearing Office. "You may be assured that this case will be assigned to an administrative law judge as soon as possible" was, again, the response I received, although the case has now been pending for over six months.

As my constituent noted in his original letter, "I am not expecting assistance for a prolonged period of time, but until medical treatment is completed and I can return to work, I feel some assistance should be provided." I agree with him, and I find it inexcusable that he has had to wait so long for a hearing date.

The purpose of the disability program is to protect workers against loss of income during periods when they are unable to be gainfully employed. The intent of the law and the program cannot be met, however, as long as current delays experienced by applicants persist and as long as those who may be qualified are therefore denied the opportunity to have their eligibility determined.

Through the hearings on the appeals process which you are now holding, I hope the subcommittee will be able to reach a consensus on how best to expedite claims for disability benefits that reach the hearing stage. Perhaps we should simply increase the number of administrative law judges or perhaps we should reexamine the entire program in an effort to make it more realistic and responsive to current needs.

Again, thank you for the opportunity to present this evidence on the problems caused by delays in the appeals process.

With warm regards,

Sincerely,

ROBERT J. CORNELL,
Member of Congress.

STATEMENT OF HON. JOHN J. DUNCAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. Chairman, during today's hearings, the subcommitee has addressed the problem of adjudicating disability cases with regard to the difficult work load placed upon judges and hearing examiners and the often complicated and lengthy appeals procedures faced by claimants. I would like to include in the record for consideration by the subcommittee the following comments on this issue as presented by an Administrative Law Judge from my district who has experienced many of the problems with which the subcommittee is concerned:

"During June of this year, Commissioner Cardwell testified before the Public Assistance Sub-Committee that the backlog of cases in the Bureau of Hearing and Appeals (BHA) had risen from 77,000 a year before to 113,000 at that time. It is reasonable to assume that some of the cases are at the pre-hearing level and some are at different levels of appeal after hearings. Everyone would agree that speed in clearing up this large number of cases is desirable. A fair and impartial hearing to each claimant is just as desirable, and a quick hearing should not work to deprive a claimant of benefits that a well developed hearing might ensure him.

"The staff reports of the Ways and Means Committee and its subcommittees have consistantly maintained that Congress intended that the Supplemental Security Income Act to be under the Administrative Procedures Act. However, the Civil Service Commission interpreted the act differently and refused to supply a register of Administrative Law Judges to the Social Security Administration (SSA). This resulted in the Security having to appoint non-APA SSI Hearing Examiners to hear these cases who, as such, are not authorized to hear Title II cases. At the beginning of 1976, there will be approximately 175 SSI Hearing Examiners in the field. The BHA management states that we are receiving approximately 70,000 SSI Requests for Hearing per year and about 40,000 of these cases are "concurrent cases", involving both SSI and SSA issues. Because of the SSA issue, the SSI Hearing Examiner is not authorized to hear the concurrent cases. The 30,000 per year case load is not sufficient to justify a corps of 175 SSI Hearing Examiners. BHA is receiving annually approximately 80,000 concurrent and straight SSA cases which may be heard only by Title II judges. There are fewer than 500 such judges to hear the new cases coming in and eliminate the existing backlog, and normal attrition is reducing the corps more rapidly than the Civil Service Commission can supply new judges from its register.

"Quite obviously, one of the first solutions that comes to mind is to use the corps of 175 SSI Hearing Examiners who are trained and in the field hearing cases similar to the SSA cases. Unfortunately this is not as simple as it seems.

"In June 1975, Commissioner Cardwell testified before the Public Assistance Subcommittee concerning this problem and stated it is highly desirable that the agency be permitted to use SSI Hearing Examiners to hear SSA cases. As a result of these hearings, H.R. 8911 is now before the full committee. This bill provides authority to the Secretary to appoint temporary Administration Law Judges to hear Title II, Title XVIII and Title XVI cases until December 31, 1978. It eliminates completely the SSI Hearing Examiner and places SSI hearings under APA. The Title II judges, for the most part oppose the bill. They feel it might well be the beginning of a progressive erosion of the judicial independence that is accorded them by the APA. A temporary judge that is to be evaluated and re-hired by BHA in order to receive a permanent job at some time in the future cannot maintain the independence that is required to provide and complete and thorough hearing and render a fair and impartial decision.

"Management objectives and the judicial objectives of the hearing officers are of necessity different. The initial claims adjudicator has one motivation—to be very strict in his application of the definition. The Appeals Officer, on the other hand, has been conditioned by his own training to take a very liberal attitude and to put the burden of proof on the federal government. The agency adjudicator is bound by policy and procedure developed by agency management. His decision is circumscribed by agency interpretation. The hearing officer, on the other hand, is a highly trained professional legal officer. He is permitted to interpret the law as written by Congress and his decision is protected by the APA. As far as his decision is concerned, he speaks for Congress. His decision embodies what his professional training and experience tell him is the intent of Congress. He is protected from agency motivation by Congress through the APA.

"The fundamental difference between the two approaches is historic and traditional. Congress, and only Congress, can determine whether it wants to continue a system which contains both the agency adjudication and the appeals hearing officer, or whether it will abolish one or the other. If it wants to provide claimants with a hearing officer which is independent of agency motivation, then the hearing officer must remain inviolate. Title II judges feel that H.R. 8911 is a serious encroachment on the independent hearing that claimants have been accorded in the past. A temporary judge is much more susceptible to agency "motivation" than is a permanent APA judge. The temporary judges want to be permanent judges with the BHA and must necessarily be aware that they will have to be re-hired by BHA to become permanent. They are thus more likely to be motivated by management policy.

"The permanent judges also feel that oughtright "grandfathering" of SSI Hearing Examiners and Black Lung Judges into the program would be undesirable. The action would set a precedent which would make it easier in the future to relax the standards which have provided the safeguards of a fair and impartial hearing. However, between the two alternatives outright "grandfathering" is immeasurably preferable to the temporary appointments.

"The permanent judges and the Hearing Examiners suggest another alternative which is workable and which would eliminate the backlog and at the same time maintain inviolate the APA safeguards. SSI Hearings should be placed under the APA and the present Hearing Examiners and temporary Black Lung Judges should be deemed by Congress to have been appointed as APA Administrative Law Judges. The Legislation should provide a grade no lower than GS-14. Congress has stated through its committee staff reports that this was its original intent when the SSI Bill was passed. The SSI Administrative Law Judge could thus hear and decide SSI cases that do not involve Title II cases. Since this work would not require the full time of the SSI Administrative Law Judges, they could spend the remainder of their time writing Title II decisions under the direction of the Title II judges of cases heard by Title II judges. This procedure would force the Title II judges to hear more Title II cases and thus effectively eliminate the backlog. At the same time, claimants would be accorded the protection of the APA in all hearings and decisions, and SSI Administrative Law Judges would gain experience to become Title II judges."

STATEMENT OF HON. PETE DU PONT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF DELAWARE

Mr. Chairman. In co-sponsoring this legislation, I hope to help my constituents who are unfortunate enough to be caught in the processing delay of the Social Security appeal system, by correcting some of the inequities within the system. I have been contacted many times by process-weary applicants who have had to wait an unbelievable amount of time for a hearing while their families not only do without but live in a constant state of uncertainty. As you know, Mr. Chairman, from the date of an original application for benefits through the hearing decision, the time involved can be well into two years for the applicant. A review by the Appeals Council could mean an additional two to four months. Regardless of the final outcome, this is too lengthy a time period and the need for a revision is obvious.

From the documented information I have received, in most instances the greatest delay occurs between the date a hearing is requested and the time hearings are actually held. One of my constituents filed for a hearing in September, 1974. It was August, 1975 before it was held. Another constituent made his original application in February, 1974 and did not have the hearing until July, 1975, after requesting it in January of 1975. In another instance, a constituent made an original application in October, 1973 and finally had a hearing October, 1974 with a decision finally received in late March, 1975 which was then followed by a review by the Appeals Council! In yet another case, the hearing was requested in August, held in March, and the decision received in late April. A six-month plus waiting period just to have the hearing followed by the time needed for the judge to render a decision followed by a possible review by the Appeals Council involves a 9-month plus time element to begin with. The delays in the first stage of determination (doctors' reports, medical and hospital records, further examinations) involve factors over which the Social Security Administration has no control. It is therefore logical to change the area over which it does exercise control.

As I read through the proposed legislation, however, I am not at all sure that it remedies the situation. Section 1124(1) reads "Any duly requested hearing to which an individual is entitled thereunder will be held within a reasonable period of time after such hearing is so requested . . .". I am concerned with what has almost consistently been a 6-month plus wait to have the hearing. I would like to propose the Section to state "any duly requested hearing to which an individual is entitled will be held within ninety days after such a hearing is so requested . . .". It is my feeling that "a reasonable period of time" can be interpreted to mean anything that the interpreter wishes it to.

Section (2)(A) reads "Not later than ninety days after any hearing . . ., the Secretary shall render a final determination on the issues . . .". I would propose that the section read "Not later than sixty days . . ." as the decisions received by most of my constituents were received within 45 days of the hearing. There are exceptions, however; in one instance the decision took 5 months! I would also propose (B) Subsection 2(a) read "except that the applicable period of time shall be 90 days" rather than the present "except that the applicable period of time shall be one hundred and ten days." Otherwise, the proposed legislation might actually lengthen the process for my constituents with reference to the receipt of the decision.

I have been advised that there is other legislation before this committee, Mr. Chairman, which, from my experience, would be an enormous help toward eliminating the inexcusable delays.

Under the current system, Hearing Examiners (appointed by the Secretary of H.E.W.) are allowed to hear only disability cases from Supplemental Security Income (SSI) applications and not applications from regular Social Security (Title II) applicants. Today only Administrative Law Judges (career Civil Service Positions) can hear cases which in any way involve regular Social Security (Title II) applications. This makes little real sense, Mr. Chairman, with regard to disability cases, because the disability guidelines are the same for both kinds of applicants, and the qualifications for Hearing Examiners and Administrative Law Judges, I understand, are exactly the same.

Today, in Delaware at least, the Hearing Examiners are not fully utilized locally and often are called upon to travel to other states to hear the SSI disability cases, while delays and backlogs involving regular Social Security (Title II) disability continue to mount.

The pending legislation, Mr. Chairman, would give the Hearing Examiners and the Administrative Law Judges the same status, permitting them to hear both types of cases. This legislation, or some similar change, would, in my State, be another big step that could be taken to better utilize existing manpower, and thereby reduce the intolerable and inexcusale delays which my constituents, and I know many others across the country, are facing in disability determination cases.

The backlog of cases waiting for hearings is partially the blame for the delay in time according to the Social Security Administration yet a 40% to 50% reversal of decisions takes place at the hearing level. It would appear there ought to be possible revision of the process at an earlier level—reconsideration—so as to avoid some of this backlog. Oviously factors are being overlooked which would work to the applicant's benefit.

STATEMENT OF HON. DANTE B. FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, and members of the Subcommittee, I am glad to have this opportunity to submit views on a problem that is of increasing importance in my congressional district.

Your interest in scheduling hearings on delays in the Social Security appeals process is commendable. This effort to find ways to improve administrative procedures and speed up the processing of claims should be of great benefit.

It is distressing that those who have contributed to the Social Security program over many years of hard work now find that in their time of greatest need, they are unable to obtain benefits without months of frustrating delay. Yet I have received a few complaints from constituents about the length of time required to have their benefits approved in appeals cases.

This problem is particularly acute in locations, such as the South Florida area which I represent, where there are large numbers of retirees. The higher proportion of persons receiving, or who should be receiving, Social Security checks in my district has brought the matter more forcefully to my attention.

I know the Subcommittee will be receiving data on the overall number of Social Security cases of various types currently pending in the appeals process. You will also learn of the average length of time required to schedule a hearing, reach a decision, and then have action taken on the decision.

As we all are, I am in receipt of individual complaints about the unfair hardship involved in excessive delays. The people involved may be elderly, disabled, or otherwise unable to find other sources of income while awaiting a decision on their benefits eligibility.

For these people, a monthly Social Security check is often the difference between viability and economic catastrophe. A typical delay of six months to a year or more means seemingly interminable suffering.

While I recognize that the government cannot simply hand out Social Security checks without question in cases where there is a dispute over eligibility, we also have an obligation to those who placed their trust in Social Security as a means of self-support after their employment ceased. Elemental fairness requires that decisions be made and benefits paid in a more reasonable period of time.

I hope that your hearings can develop information on ways by which the administrative process can be accelerated. I have co-sponsored H.R. 9580, the Social Security Rights Act, as a means of providing emergency payments if appeal decisions are not made within specified time periods. As an alternative to legislation, application of the Administrative Procedures Act to Social Security cases could be considered.

In any event, we cannot stand idly by while our constituents suffer delays that might be due to insufficient appeals personnel, clerical workers, computer difficulties, or other causes that can be resolved by more efficient administration.

I urge the Subcommittee to take prompt action on behalf of the many needy people in South Florida and all across the nation who have applied for Social Security benefits but are suffering from inordinate delays due to the inability of the Social Security Administration to act in a reasonable time.

STATEMENT OF HON. DONALD M. FRASER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. Chairman, the Social Security System began 35 years ago. It has grown to become one of the largest, most complex, and most successful Federal programs in our nation's history. Our goal continues to be providing for the financial security of millions of Americans. Today, 31 million people per year receive some form of social security benefits. Unfortunately, over the years Congress and the Social Security Administration have not recognized a growing roadblock to getting these benefits to eligible individuals.

Today, Social Security offices all over the country are experiencing increasing backlogs of appeals hearings, caused mainly by insufficient numbers of administrative law judges. The result has been to leave thousands of beneficiaries in a precarious financial position for months on end, denying them the benefits to which they might be entitled.

I'm sure the delays in Minnesota are as bad as those being experienced all across the country. Currently, only four administrative law judges have been provided by the Social Security Administration for the entire State of Minnesota, plus Superior, Wisconsin. With 800 hearing applications pending, our judges are now reviewing cases from November and December, 1974—a delay of nine and ten months. Compounding the problem is the possibility that one of the judges is new and the possibility that another judge may be transferred.

Those living in the more rural areas of the State, where the judges have decided they will go only if a group of cases can be heard the same day at the same location, are experiencing even longer waits for hearings.

Some examples of actual cases handled by my Minnesota district office, I think, illustrate the unnecessary frustration felt by potential Social Security recipients:

> *Case 1.* Mrs. E. C. first applied for disability benefits in February, 1974. Her application was denied and she applied for a reconsideration on August 18, 1974. The reconsideration was denied and she applied for a hearing on November 14, 1974. She finally had the hearing on August 27, 1975—an 8-month wait. She still does not have the notice of determination.
>
> *Case 2.* Mr. D. K. applied for disability benefits in August, 1972. His application was denied. He applied for a hearing on August 5, 1974, which took place on February 6, 1975. He received the notice of the hearing on April 23, 1975, won approval, and was awarded benefits. His hearing delay was 7 months, plus almost two and a half-month wait for the final determination.
>
> *Case 3.* Mr. D. D. requested a hearing on February 3, 1975. After a delay of over 7 months, his hearing may be scheduled for the end of October when a judge from another region comes to Minneapolis to help with the backlog.

Clearly, Mr. Chairman, when Congress provided for an administrative hearing process in the Social Security Act, it was to protect individuals' rights to pursue the benefits they felt due them—not to frustrate their efforts.

It is our responsibility, then, to provide the funding and authorization necessary so that additional administrative law judges can be hired to eliminate these long delays.

I am hopeful this committee will strongly recommend this needed improvement in our Social Security System's hearings process.

STATEMENT OF HON. JAMES M. HANLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I am delighted that the Subcommittee on Social Security has recognized the severity of the problems being created by the tremendous backlog of social security cases awaiting disposition before administrative law judges. This has been a matter of great concern to me for quite some time, and I am pleased to be able to appear before you today to present my views. I sincerely hope that the backlog of cases will be eliminated as a result of legislation which will be reported by this Subcommittee. In this regard, I would like to go on record in support of H.R. 8847, a bill which I have cosponsored.

A few months ago, an individual in my Congressional District who filed a hearing request on the denial of a social security claim could expect to wait six months for a hearing. Presently, the waiting period has increased to nine months. This creates tremendous hardships for those disabled individuals who cannot work and have no income.

While the Administration would cite the Black Lung and SSI programs as the major reasons for the backlog, the problems appear to be considerably more complex. Certainly, in some areas of the United States, where the coal mining industry is predominate, the number of Black Lung claims would present great problems. However, in most areas of the United States, the number of Black Lung claims are minimal. Statistics from the Syracuse Office of the Bureau of Hearings and Appeals indicate that only 6.15 percent of the hearing requests which have come into that office from the beginning of the year through August 16th, were Black Lung claims (refer to attached table). Since that office services an area which includes a portion of the Pennsylvania coal mining district, the caseload of Black Lung claims which come into that office is probably greater than that in many other areas of the United States.

Also, while the initial impact of the SSI program no doubt added to the hearing caseload, this cannot be a valid explanation for the ever increasing backlog. Again, statistics from the Syracuse Office of the Bureau of Hearings and Appeals (as reflected in the attached table) indicate that 20.61 percent of the cases received from the beginning of the year through August 16, was concurrent SSI claims. The number of SSI claims has remained rather consistent, and would not account for the increase in the backlog during the last several months.

However, a major shortcoming in the present system is the lack of communication between the Social Security Administration and the claimant. An individual whose disability claim has been denied is sent a form notice which merely states that he, or she, does not meet the requirements for disability as defined by law. The claimant is never advised what the requirements and law are, nor is the claimant informed why these requirements were not met. The claimant who attempts to uncover this information on his own usually runs up against a stone wall. Indeed, the caseworker in my office has informed me that it is very difficult for her to obtain any substantial information as to the precise grounds for denial of a claim. If my office is unable to obtain this information for my constituents, one can imagine the difficulty which a claimant would have in attempting to obtain this information on his own. The legislation which I have cosponsored would provide for a claimant to meet with a representative from the Social Security Administration upon filing a request for reconsideration to discuss the intial denial of his claim, and would provide for the claimant to receive a written report summarizing the evidence and citing and discussing pertinent laws and regulations upon affirmation of the initial denial at the reconsideration level. While both of these procedures would be desirable, it may prove too costly to implement both of them. However, a detailed written statement, as provided for in H.R. 8847, should certainly be provided to the claimant upon affirmation of denial at the reconsideration level.

Once the claimant is furnished such information, I firmly believe that the number of hearing requests on claims, wherein the lack of total disability is clearcut, would be greatly reduced. Also, in those cases where a claim has been denied because of a lack of evidence establishing disability, it would enable the claimant to obtain any additional documentation which may be needed in support of the claim. This, too, would cut down on the amount of time for final disposition of a claim.

Another difficulty is the amount of time which a claimant is presently allowed from the time of the initial denial to file a request for reconsideration, and the amount of time which a claimant is allowed to file a request for a hearing after the upholding of the denial on reconsideration. I have been advised that the majority of claimants wait the maximum amount of time before requesting a hearing. By the time a request for a hearing is received, as much as 18 months could have elapsed since the initial claim was filed. In many instances, the claimant's condition has deteriorated during that time span. While the claimant may indeed not have been disabled at the time of the initial claim or request for reconsideration, by the time the case comes up for a hearing his condition may have deteriorated to the point where he is now disabled. Thus, the claim which comes before an administrative law judge is, in essence, different from the claim which was originally filed. Upon reversal of the original denial, the claimant is paid retroactive benefits, when, in all probability, the claimant should not have been entitled to benefits for the entire period of time. This constitutes an unnecessary drain on the trust fund. A provision of H.R. 8847 would eliminate this difficulty by reducing the amount of time to file reconsideration and hearing requests from the present 6 months to 30 days.

Additionally, administrative law judges serving within the Social Security Administration are not treated the same as those serving with other agencies of the Federal government. In the City of Syracuse, City Court judges are paid more than the Social Security Administration's administrative law judges. Yet, City judges only have jurisdiction in civil cases involving sums less than $6,000, while the average amount involved in a social security disability claim is probably close to $60,000. Judge Alfred T. Tyminski, who is Administrative Law Judge In-charge of the Bureau of Hearings and Appeals in Syracuse, New York, advised me that last year he adjudicated claims worth about $10 million, and he expects that the claims which he will adjudicate this year will be worth twice as much. In consideration of the awesome responsibilities involved, it is little wonder that the Social Security Administration would have difficulty retaining qualified administrative law judges. It is only fair that administrative law judges serving with the Social Security Administration be treated equitably. Therefore, a provision of H.R. 8847 would allow for the Social Security Administration's administrative law judges to be classified at a grade not lower than GS–16, the rating currently assigned to administrative law judges serving with other Federal agencies.

Another major deficiency in the present system, which I feel is in large part responsible for the backlog of claims, is the improper development of claims at the reconsideration level. In this regard, Judge Tyminski has informed me that approximately 70 percent of the cases which come before him need additional development. The only documentation contained in a claim folder which he recently received consisted of notes of a telephone conversation with the claimant's physician, and these notes were not even signed by the person who made them. In such instances, the Judges must assemble the necessary documentation needed in order to have enough information to make a fair assessment of these claims. If such information is not contained in the file by the time the case comes to the hearing level, one must wonder what was accomplished at the reconsideration level, and upon what information the reconsideration decision was based. While it might help to hire more administrative law judges, in my estimation this would be skirting the issue and would not solve the problem. The fact still remains that claims are not being reviewed carefully enough at the reconsideration level. This is further evidenced by the fact that close to 50 percent of claim denials is presently being overturned at the hearing level. This indicates that many of these cases should have been allowed at the reconsideration level, and should not have had to come before an administrative law judge for a hearing. Aside from the inconvenience to the claimant, unnecessary hearings create needless expenditures, as it costs about $400 to hold a hearing.

The bill H.R. 8847 does not deal with the problem of case development; however, I believe this is an area which definitely deserves attention. Inasmuch as the State agencies currently have the staff and facilities for the development of claims, it should be unnecessary to hire additional judges and to increase their staffs in order to accomplish this. Therefore, the administrative law judges should be able to remand any insufficiently developed cases to the State agency for additional documentation and development. In order to make certain that such development is done properly, the claim should be reviewed by the administrative law judge or a qualified staff member, and a statement of the additional documentation or development required should be furnished to the State agency. This procedure should save considerable time for the judges and their staff . . . time which could be effectively used to hold hearings and write hearing determinations.

If all of the aforementioned procedures were implemented, I believe that the present corps of administrative law judges would be able to adjudicate claims more efficiently and effectively. As a result, the backlog of claims would diminish rapidly, and claimants would receive better service. Therefore, I respectfully urge that the members of this Subcommittee give favorable consideration to the provisions which I have outlined today.

In closing, I would like to again thank you for the opportunity to appear before you to present my views on this important matter, and would like to assure you of my support of any legislative measures which may be reported containing provisions similar to the ones I have described today.

HEARING REQUESTS RECEIVED BY THE BUREAU OF HEARINGS AND APPEALS, SYRACUSE, N.Y., FROM JAN. 1, 1975, THROUGH AUG. 16, 1975

For 4-week period ending—	Total new claims	Black lung claims	Percent of black lung claims	SSI claims	Percent of SSI claims
Feb. 1, 1975	64	0	0	7	10.9
Mar. 1, 1975	73	1	1.3	12	16.4
Mar. 29, 1975	64	3	4.7	10	15.6
Apr. 26, 1975	59	1	1.7	11	18.6
May 24, 1975	72	3	4.2	20	27.8
June 21, 1975	61	0	0	14	30.0
July 19, 1975	67	12	18.0	22	32.8
Aug. 16, 1975	93	14	15.1	18	19.4
Total	553	34	6.15	114	20.61

STATEMENT OF HON. W. G. (BILL) HEFNER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. Chairman and members of the subcommittee, I appreciate having this opportunity to present testimony before your Subcommittee during these hearings concerning the problems of delays in the Social Security appeals process. These delays are indeed causing many claimants to have to wait long periods of time before their rights can be adjudicated by a hearings officer as required by the Social Security law.

This is not my first effort to determine the reasons behind the huge backlog of hearings cases and to try and find a solution to this situation. I've encountered many problems in trying to assist the people I represent in North Carolina in having their claims reviewed within a reasonable amount of time. Since coming to Congress, my staff and I have consistently been frustrated in our efforts to try to help people receive prompt consideration of their disability claims and other social security problems.

I believe that the long delays we've been experiencing are inconsistent with the intent of the social security programs—namely, to provide insurance against loss of earnings in the event of retirement, death, or disability.

I realize that there are several factors which have contributed to the present dilemma of huge backlogs of pending claims and payment problems. An informal survey of Members conducted by Congressman St Germain revealed that constituents across the country are experiencing delays of anywhere from 6 months to 3 years in having their appeals cases heard. The reasons for the backlog appear to be numerous, ranging from the Supplemental Security Income program (SSI) caseload to the fact that Administrative Law Judges are required to have seven years of experience and are comparatively underpaid. Also, with a reversal rate of approximately 50%, the benefits of appealing a social security decision are apparent. Therefore, we have the current intolerable situation of at least 120,000 backlogged cases.

Often the people seeking these decisions are those most desperately in need of assistance, and yet their hearings are delays indefinitely. The disastrous financial affects this delay in processing and approving disability and other claims of people who are totally dependent on social security payments is tragic.

Commissioner Cardwell has indicated that the median processing time for disability hearings in July 1975 was about 7 months, and, of course, half of the cases took longer than 7 months to process. Also, figures released by the Social Security Administration show that in January 1975, the average processing time for initial disability claims was 110 days for allowed claims. However, before the present crisis situation, disability claim processing time averages have fluctuated between 60 and 90 days. In reality, unfortunately, the actual number of days and months people must wait for decisions on their claims is substantially higher. The length of time spent in processing allowed reconsideration determinations is generally longer than for initial disability determinations.

It is my understanding that the average processing time for a hearings decision has jumped in the last 8 years from 93 to 213 days as of December 1974. This figure represents the amount of time elapsed from the date a hearing request is made until the date of the decision. Even more shocking are some of the cases I've experienced from the region of North Carolina that I represent.

I estimate that the number of pending Social Security claims in my office alone total between 200 and 250 cases. Of those, at least 50% are at the hearing stage.

In July, I made several inquiries through the Social Security Administration in an effort to try to do something about this huge backlog of hearings cases. Of particular concern were the delays my office was experiencing and still faces today with the Bureau of Hearings and Appeals (BHA) office in Charlotte, North Carolina, which handles almost all hearings cases from the 8th Congressional District.

I requested that Administrative Law Judges (ALJ) from other regions be assigned to the Charlotte BHA office on a temporary basis to clear up some of the backlogged cases which have been waiting for a hearing since 1974. But I was informed by the Chief Administrative Law Judge of the Social Administration that such delays at the hearings stage is a nationwide problem and that the situation in Charlotte is not as severe as in other areas.

As of September 13, 1975, I have been advised that the national average of cases pending per Administrative Law Judge (ALJ) totaled 153. In the Charlotte BHA office the average number of pending cases per ALJ came to 167.

I was advised in July that a new Administrative Law Judge would be assigned to the Charlotte office in August. And I received assurances that two more Administrative Law Judges would be assigned to the Charlotte BHA office as soon as possible. However, our problems with hearings delays have not yet been resolved by any means. Within the past several weeks, a number of incidents have brought to my attention which illustrate these problems.

Through a telephone call to the Charlotte BHA office requesting the status of a claimant's hearing, we were advised that a hearings decision had been rendered on this claim. However, we were told that the delay in advising the claimant of the decision was caused by a lack of clerical personnel to type the final decision. Furthermore, we were informed that a two months' backlog of cases existed: these cases had been decided but were waiting to be typed.

Now, I really can see no valid excuse for this type of delay. Typists do not require the specialized knowledge that ALJs do. Therefore, I cannot understand the reasons for not hiring additional clerical personnel on a temporary basis to clear up this particular backlogged situation.

A very discouraging and frustrating problem that I've consistently experienced with the Bureau of Hearings and Appeals relates to my efforts to be advised of the action taken on an individual's claim. I believe that when my office contacts the Social Security Administration requesting to be advised of the action taken on a case, this information should be made available to me at the same time it is provided to the claimant. Many times my office has not even been given the courtesy of a response to my inquiries made concerning such claims. Therefore, a number of constituents who have asked for my help with their claims receive a notice of denial or approval from the Bureau of Hearings and Appeals without my ever knowing that a decision on this claim has been rendered.

In checking on the status of cases at the hearing stage, I have found it easier, quicker, and more reliable to obtain this information from the Managers of the Social Security District Offices located within the area I represent. For example, after repeated efforts to obtain the status of a hearing request file in 1974 by a claimant from the Charlotte BHA, my office finally contacted the District Manager of the Social Security office in Kannapolis, North Carolina, for a status report. The Kannapolis District office Manager advised me that this claim had been sent to one of the Bureau of Hearings and Appeals offices in Mississippi for a hearing determination. I did not receive at that time nor have I to this date received any word from Charlotte BHA office as to the action taken on this claim.

I would like to take this opportunity to bring to the Subcommittee's attention several examples of the truly inordinate delays in the processing of disability claims which I've experienced within only the past several weeks.

One woman in my district filed a "Request for a Hearing" on her claim January 2, 1975. Another woman filed for a hearing on her claim January 27, 1975. On the same day both individuals called my office concerning their claims as they had received no word from Social Security since filing a hearing request. Upon checking with the District Social Security office, I was advised that neither of these claims has yet been heard; no hearing dates have been set; and there is no indication as to when hearings for these two claims may be scheduled.

In another instance, I received the following information in a letter from the Kannapolis District Social Security Branch Manager on May 20, 1975, in response to my inquiry concerning the status of a constituent's claim. (In referring to a specific case, for purposes of identification, I will refer to the claimant as Mrs. Jane Doe and to the Judge as Judge Smith, although these are not the individuals' true names.)

"This concerns your telephone inquiry on this date regarding the above-named claimant. . . .

"Mrs. Doe filed a request for Social Security (SSA) disability on October 31, 1973. . . . She filed a request for reconsideration on July 12, 1974, and the denial was affirmed. She filed a "Request for a Hearing" on September 30, 1974. Mrs. Doe's case is ready to be heard but was assigned to Judge Smith. Unfortunately, Judge Smith has been hospitalized for five weeks and the date he is to return to work is uncertain at this point in time.

"I inquired about the possibility of reassignment of this case to another judge, but as you know, each of the judges are heavily backlogged. Mrs. Doe's case is at the top of Judge Smith's list. We are hopeful that she will have her hearing shortly."

After receiving no further word from the Charlotte BHA office concerning this case, I again made another inqury through the Kannapolis District office, and received the following response dated September 26, 1975.

"This concerns your recent inquiry on behalf of Mrs. Doe. This case is still pending at the Bureau of Hearings and Appeals (BHA) in Charlotte, North Carolina. As you know, Judge Smith has been sickly and has been able to hear only a limited number of cases. In addition there is a continuous prevailing backlog to be heard.

"I called the BHA in Charoltte on September 25, 1975, and they indicated that it may still be several weeks before Mrs. Doe's case is scheduled for a hearing."

Therefore, as this information indicates, over one year has elapsed since this claimant filed a "Request for a Hearing" (September 30, 1974), and her case has still not even been scheduled to be heard by an Administrative Law Judge.

I also received the following letter from a constituent dated September 28, 1975, concerning this person's request for a hearing on her claim.

"Thank you so much for your recent letter and for the interest you have shown in my problems with Social Security.

"I filed an application for a hearing this past week. The Social Security representative advised me at that time that it usually takes about one year to process an application and schedule a hearing.

"I would again appreciate anything you could do to speed up this process and to assure that I receive a fair hearing. A year seems like a ridiculously long time for processing, and a person could starve to death during that year if it were not for the goodness of relatives and friends."

In my view, hearings delays such as these few examples among many that I have mentioned to the Subcommittee are unnecessary, unfounded; and in addition, they work a real hardship on those people who are unemployed due to disability and who must depend upon this assistance from Social Security—whenever it may come—in trying to meet their daily, basic needs. In the meantime, many such individuals lose their homes and all their belongings.

In addition, I would like to bring to the Subcommittee's attention a recent incident of the Social Security Administration providing me with erroneous information with respect to an individual's disability claim. After writing expressing my interest to the Social Security Administration in this claim for disability benefits, I was advised by the Bureau of Disability Insurance in a letter dated August 5, 1975, that the claimant's records were under review by the headquarters disability staff. In a subsequent letter from the Bureau of Disability Insurance dated September 22, 1975, I was informed that the Bureau was not yet able to provide me a complete report on this person's claim as the review of her records was not yet completed.

In the meantime, I received a letter on September 29, 1975, from this same individual stating: "On September 6, 1975, I received my first disability check from Social Security. It took eight months, but thanks to you . . . it was finally resolved."

This is only one among the many occasions when I have received erroneous and misleading information on the status of an individual's claim. There is clearly a need, in my view, for the Social Security Administration to be able to respond to such inquiries properly so that I may advise constituents correctly of action taken on their claims.

Mr. Chairman, I believe that I have cited enough examples of the delays and mix-ups I have experienced with individual Social Security claims. However, let me stress that these represent only a few of the numerous problems my office has encountered in trying to assist constituents with their claims.

I greatly sympathize with the problems and concerns of the people who contact me regarding the long delays in the processing of their claims. Such delays work a real financial and emotional hardship on these individuals who are waiting for their disability claims to be heard by an ALJ.

The problem of backlogged hearings cases has become a very emotional issue. As a result, hundreds of bills have been introduced in the Congress in an effort to deal with this problem and to rectify some of the current delays in the Social Security appeals process. I too have co-sponsored such legislation, particularly the Social Security Rights Act, introduced by Congressman Seiberling. This bill would require the Social Security Administration to make decisions on social security benefits claims and payment problems within reasonable periods of time.

However, I'm not certain that any one of the many proposed bills contain the sole answer or the correct solution for eliminating these backlogs. It would seem to me that some of the burden for eliminating such backlogs must rest with the administrative personnel within the Social Security Administration. Therefore, the question I raise is: what exactly can be done at the administrative level and what exactly can be done at the legislative level to reach a meaningful and lasting solution to these problems in the processing of benefits claims?

The Commissioner has proposed an increase in the number of Administrative Law Judges within the Social Security Administration in addition to providing legal assistants and other support personnel for each ALJ's personal staff. There's no doubt that a doubling of the number of personnel within the Bureau of Hearings and Appeals will help to reduce the backlog of pending cases.

Also, as I mentioned before, a number of legislative proposals have been introduced to try to deal with this problem. Some of these measures would provide for an increase in the grade and pay of Social Security Administrative Law Judges, and other measures would expand the coverage of the Administrative Procedure Act to bring SSI hearing examiners under its provisions. However, I question, as have others, whether the APA is suited for the type of benefits claims adjudicated by such agencies as the Social Security Administration.

Of great concern to me is the cost of hiring additional ALJs and ALJ support staff as well as the cost of increasing the pay for Social Security ALJs since these costs must be paid for with Social Security trust fund monies. I believe we are all aware of the concerns which have been expressed about the current and future financing problems of the Social Security trust fund. Individual payroll taxes which go into the trust fund to sustain its operation will have to be increased in order to pay for the future retirement and old age and survivors benefits to which individuals are entitled.

I firmly believe that any attempt to add an extra financial burden to the Social Security trust fund and to spend our citizens' money by substantially increasing the costs of the Social Security hearings and claims adjudication process should be approached with great care and caution. Irresponsible use of these funds could result in individuals having to pay more and more of their paychecks to support the Social Security trust fund as money goes out for increased hearings and claims processing costs with no definite assurance that such actions will indeed prove helpful in expediting the processing of benefit claims.

Therefore, I would suggest that before the Congress takes any legislative action that the GAO or some other independent source bring together all of the studies that have been conducted on the processing of benefits claims and make any further needed investigations, with the result of putting together all of this information into one complete study. Such an effort should be conducted for the purpose of determining the most efficient means of adjudicating the claims of individuals filing for Social Security or Supplemental Security Income benefits.

The study should contain an audit of the Bureau of Hearings and Appeals to determine if the Bureau is making maximum use of its current resources. I would suggest that the impact of the Administrative Procedures Act (APA) and its use in adjudicating the benefits claims be included in this report.

Furthermore, I believe that any such report should address itself to the possible need to review the productivity level of SSA Administrative Law Judges. Under the APA, as I understand it, there is no provision stipulating the number of hearings an ALJ should process, and there is no review mechanism under which the performance of ALJs can be evaluated. Therefore, a discussion of the merits of implementing such an evaluation procedure could prove beneficial in determining the criteria and standards ALJs should use to process hearings in a more expeditious manner.

Another question I raise that could be included in this study is the proposal of setting shorter time limits in which claimants can request further consideration of their claims. It is my understanding that although the Social Security law currently provides for a 6-month time period in which persons may request further review of their claims, the time in which individuals now request such reviews averages between 60 and 90 days. Lastly, I would suggest that this study include an assessment of the major legislative alternatives pending before the Subcommittee to discuss their viability toward making beneficial and lasting solutions to the processing of benefits claims.

I believe that with the proper directives established and a time limit indicated for the GAO or another independent source to use in producing this report, the results of such a study could provide the Congress with the proper framework to determine the needed areas in which to channel our legislative responses to the problems of adjudicating benefits claims within a reasonable time.

I appreciate having this opportunity to present my views on this truly pressing problem to the Members of this Subcommittee. I trust that my testimony will be helpful in pointing out some of the specific problems I have experienced with respect to the processing of benefits claims. I hope that as a result of bringing these problems to your attention, the people of the 8th Congressional District of North Carolina and people in other areas of the country may look forward to receiving the prompt and careful attention their benefits cases deserve.

STATEMENT OF HON. ALBERT W. JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman and distinguished members of the committee, I welcome the opportunity to testify before this distinguished Committee about a subject that has been of great concern to me for the last several years—the delay incurred in the processing of Social Security disability claims. When an individual becomes disabled, he is usually under considerable financial strain due to the increase in medical expenses, which is added to the everyday cost of living expenses, and loss of salary. There is also considerable emotional strain encountered when a disabled person realizes that he or she can no longer contribute to the family income. Each worker who has paid into Social Security naturally feels that the benefits will be payable in time of crisis. This is not always the case and many of my constituents have been waiting from six months to three years for decisions on their disability claims.

I receive a great deal of correspondence from Social Security officials which states: "As soon as we receive additional medical evidence we will make a decision on the claim at the earliest possible time." Of course, disability must be verified and rightly so. However, a claimant can submit evidence that he feels is sufficient proof of disability and such evidence is not reviewed by the Social Security Administration for several months. It has been my experience that those cases requiring a hearing take even longer to resolve, and a waiting period of eight months is not unusual. As if a waiting period of eight months is not enough to discourage any claimant, my casework now includes four claimants who face an extended waiting period of an additional six to eight months due to the transfer of an Administrative Law Judge, whose cases must be reassigned.

After the hearing is held, it is not uncommon for an Administrative Law Judge to decide to further review a case or request additional data, which delays the decision for several critical weeks. In my 23rd Congressional District, a totally disabled person with a family to feed and mounting medical expenses, has only the alternative of accepting public assistance while awaiting a decision on his Social Security claim. In order to be eligible for public assistance savings must be reduced and the recipient must permit a lien to be placed on his home.

It is my strong feeling that a disabled person ought to have the privilege of a speedy review of medical evidence and a hearing decision rendered at the earliest possible time. The problems which I have outlined are not the only detriment to a swift resolution of Social Security claims. Therefore, I have cosponsored H.R. 1872, a bill which would eliminate the five month waiting period before disability benefits can be received; eliminate the reconsideration stage in benefit determinations; provide for the issuance of duplicate benefit checks where the initial checks are lost or delayed; and provide for expedited benefit payments to disability beneficiaries. I urge this Committee to consider this legislation and similar bills so that the maze surrounding the disability benefit program may be diminished.

I commend this Committee for holding these hearings to focus on the problems faced by legitimate Social Security claimants in order that a more orderly and efficient system may be devised. I am hopeful that meaningful legislation to correct these problems will be forthcoming.

STATEMENT OF HON. HAROLD T. JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, the Social Security Program, since its beginning, has brought significant relief and benefit to many Americans. By contributing a portion of their earned wages through the years, most Americans have had the opportunity to participate in a "retirement plan" supplement administered by the Federal Government.

In recent years, the Congress has seen the wisdom and success of the Social Security Program and has incorporated new facets in the Program. One of the most significant steps was the broadening of the Program to include more and more categories of working Americans.

After many years of discussion, the Congress expanded the Social Security Program to include basic medical benefits through the Medicare program. Most recently the program has been expanded once again to incorporate the welfare programs of the states under a Supplementary Security Income (SSI) Program.

While many Americans have greatly benefitted from this expansion of the Program, one obvious result has been an ever-increasing workload placed on employees of the Social Security Administration. It is true that the work force has been expanded. The fact remains, however, that the present work force at the local level is physically unable to devote the amount of work and attention to each individual claimant that is necessary to assure fair and equal treatment of each claim.

It is my honor today to take this opportunity to express to you my support for the bill H.R. 8018, which is pending before you. As a co-sponsor of this legislation, I believe this approach to the problem of a significant backlog of cases before the administrative law judges would help to bring about a prompt, fair, and efficient disposition of those pending cases.

Through my work with constituents who have filed claims under the Social Security Program. I have repeatedly confronted serious delays in the administrative procedures now followed. I do not intend to place the blame for this on any individual or on any portion of the work force. Instead, I strongly believe that the procedures need to be revised not only to speed up the process, but also to increase the protection of the claimants' rights under the law.

This legislation, as proposed, would clearly provide for the claimant's right to reconsideration of an adverse claim decision. While this right is frequently provided, current statutes do not make any specific assurance to the claimant. I believe this is a vital part of the claim application procedure and should be completely understood and guaranteed to all claimants.

Secondly, the bill would limit the period in which a claimant may register his desire for a reconsideration of the initial decision to 30 days from the date of the notice of an adverse decision. This shortens the period in which the claimant may make his request. However, if the necessary documentation is made available for the initial decision, those deserving benefits should have their claim approved, and those marginal cases which are denied should be ready immediately for further reconsideration. Thus, the waiting period can effectively be cut without detrimental effect on the claimant.

One of the most serious problems, from my point of view. is that many claimants never fully understand the reason for the denial of their claim. This measure would remedy that situation by instituting an "informal conference" which would be held between the claimant and one of the officials who participated in the initial decision rendered on his claim.

This informal conference would give the claimant an opportunity to discuss the reasons his claim was denied, the laws and regulations affecting his claim, and the facts and evidence submitted in connection with the claim. This face-to-face confrontation procedure has been found to be very successful in a 5-state pilot program undertaken by the Social Security Administration. Unfortunately, no effort has been made to institute this practice on a nationwide basis. Through the informal conference, the claimant would be aware of the information available to the evaluators and would have some insight into how the decision in his case was determined. He could then submit additional information before the reconsideration decision is made.

As a means of guiding the Social Security Administration in establishing procedures, this bill would require that a reconsideration determination be made within 90 days of the time that a claimant makes a request for one. Many disabled individuals have suffered substantial losses of income. To extend the consideration of a Social Security claim over a period of several months adds significantly to the financial burdens of the individual. Therefore, it is felt that certain time limitations should be instituted to keep the process rolling along at a reasonable speed.

Under provisions of H.R. 8018, a formal written statement must be given to the claimant upon adverse reconsideration of his claim. This statement must outline the case setting forth a summary of the evidence reviewed, a citation and discussion of the law and regulations of relevance to the claim, and the reasons for denial of the claim. This statement would provide the claimant with the information he needs to effectively make an appeal before an administrative law judge. It is a procedure successfully being used now by the Veterans Administration.

H.R. 8018 also proposes that a formal request for such a hearing must be made within 30 days of the adverse reconsideration. This again would help to assure prompt consideration of the claim and speed the claim along to its final resolution.

Finally, the proposed legislation would provide that hearings be conducted in accordance with the Administrative Procedures Act. This would allow review of concurrent Social Security claims under Title 2 and Supplemental Security Income claims under Title 16 to be decided at the same time, thus saving the time and expense of two separate procedures for the claimant.

One problem not treated in the legislation which I hope the Subcommittee will review is the lack of communication and understanding between claimants, doctors, and the SSA. This is one of the most critical problems facing the Bureau of Hearings and Appeals. Applications should be filed originally with adequate documentation so that the initial decision could be the proper decision. I am confident the caseload at the district offices, at the development centers, and at the hearings and appeals levels would be reduced substantially if documentation could be complete at the outset. In short, the Social Security Administration by making sure that the applicant did it right the first time, would not only be providing a service that the applicant deserves. but in all probability would be solving many of the other problems as well. This, of course, would result in substantial savings to the Federal Government.

In addition to outlining the many needs for improvement, I want to take this opportunity to express my appreciation for the efforts which are being made. The Social Security Administration has increased both the secretarial assistance and legal assistance available at the hearing level. This is a step in the right direction, but, as I have outlined, much remains to be done.

In summary, let me say that I strongly believe that action must be taken to substantially reduce the number of backlogged cases awaiting a decision. Although administrative remedies are available to correct this situation, the Social Security Administration, over a significant period of time, has shown little or no inclination to take corrective measures. Therefore, I feel legislative guidance is necessary, Mr. Chairman, H.R. 8018 provides this guidance. I am advised by administrative law judges that the current caseload of approximately 112,000 cases could be eliminated within a year's time if H.R. 8018 were enacted. I encourage the Subcommittee to give serious consideration to this proposal and take appropriate action to provide for more efficient disposition of these cases so that the claimants' rights can be fairly, equitably, and expeditiously satisfied.

STATEMENT OF HON. ROBERT J. LAGOMARSINO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, thank you for giving me this opportunity to present a statement on behalf of efforts to improve the hearing and appeals process for Social Security claims.

I am sure you are receiving considerable testimony setting forth specific instances in which delays in the Social Security process have caused undue hardship to deserving citizens. I would like to present two specific cases as examples of problems my own constituents have encountered, particularly with disability claims. I would also like to go a step further and recommend a solution to what I feel causes some of the longer delays: the fact that a physician must write repeatedly to the Commission in order to prove his patient is disabled, taking both his time and that of the Commission. He has no guidelines to follow and, subsequently, an interminable time consuming delay adversely affects the physician, the Social Security Administration and, more importantly, the Social Security applicant.

The first case I would like to cite is that of Mrs. Gladys O. M of Santa Barbara, California, who has been seeking widow's disability insurance benefits on the earnings record of her late husband. Mrs. M has been going through the Social Security appeals process since 1972. Because of her physical disabilities she has been found totally unemployable by the State of California, Department of Vocational Rehabilitation. The various physicians who have examined her have provided extensive medical reports and diagnosis of her condition.

Her third, and most recent, petition was denied by the Bureau of Hearings and Appeals in Washington on August 20, 1975, despite extensive medical documentation and statements confirming unemployability. The main deficiency that appears in this type of case is that the criteria which the physician and other agencies must address themselves to in providing documentation for a disability claim is not sufficiently apparent. In short, preparation of medical documentation for a claimant is like shooting in the dark. What is needed is a sufficiently definitive criteria set of questions—prepared by the Social Security Administration and presented to the physician and appropriate agencies that can be used in thoroughly adjudicating the case.

Physicians have very little time to spend in preparing sufficiently detailed medical reports for patients seeking Social Security disability benefits. And when the patient has to go back to the physician time and time again in an effort to obtain the kind of statement the Social Security Administration is seeking, the probability of success of the claim becomes less and less.

The Social Security Administration, in their letter to Mrs. M denying her most recent appeal, said that she "did not meet or equal the level of severity specified by the regulations." The regulations are defined in the letter as "conditions which are of a level of severity deemed sufficient to preclude an individual from engaging in any gainful activity and are expected to result in death, or to last for a continuous period of not less than twelve months." Information about the applicable criteria used to adjudicate her case was never given in the previous two years and three appeals of this claim. Furthermore, the criteria is still so vague that her physician is still unable to properly address himself to the "insufficiencies" of medical evidence presented on behalf of her claim.

In this case of Mrs. M, her current total income is $164.00 per month derived from her deceased husband's miner's pension. Mr. Chairman, the importance of prompt handling of a Social Security claim of this nature is evident. Long delays impose extensive and severe hardships on claimants who have little alternative but to wait and hope for the determination to be made on their claim.

A second and similar case involves my constituent, Miss B of Santa Maria, California. A period of disability was established for Miss B in 1967 because of an industrial injury eventually resulting in rhematoid arthritic condition.

In February of 1973, the Social Security Administration declared her no longer disabled "within the meaning of the law" and her disability benefits ceased. This action by the Administration was prompted by Miss B's efforts to go back to work. She was employed by a produce packing firm for a few days before it became obvious that she was physically incapable of employment.

The point I am making here, Mr. Chairman, is that if an individual attempts to get off of Social Security disability by attempting to go back to work, but it proves that he is still too disabled to seek gainful employment, that individual places his benefits in jeopardy. In this instance it was argued by Social Security officials that the individual attempted to work and, therefore, the disability must be terminated. In effect, a person is penalized and discouraged from attempting to get off government assistance programs too soon. This approach to evaluating on-going disability cases should be corrected.

The history of this case is quite similar to that of Mrs. M: from February 1973 until June 1975, Miss B underwent various hearings and appeals; was periodically advised by Social Security that additional medical evidence was needed. Ultimately, this constituent was awarded retroactive benefits from May 1973 and is today receiving her disability benefits.

In addition to the inconvenience, pain, and prolonged existence at a poverty level for two years and four months that elasped during the adjudication of this case, it was expensive to the taxpayer for the government to process the claim in a prolonged and inconclusive manner.

Once again, statement of determination presented by the Social Security Administration in denying the claim failed to define in specific terms what additional information and medical evidence was needed to reach a final decision. Physicians should be provided specific questions relating to the case, which when returned to the appeals council, provide necessary medical information to reach a fair, just, and final determination.

Another point that warrants review by your committee is the provision of the Social Security Administration that requires a disability claimant to be disabled for one year conclusive before that claimant can file a claim for disability compensation. This imposes a great hardship on the person seeking these benefits because he must have resources sufficient to survive on his own before he is able to seek government assitance. I suggest that the regulation be amended to allow disability compensation to provide to a claimant at an earlier date with reevaluation of his condition on a periodic basis to determine whether the disability benefits should continue.

Mr. Chairman, the problems I have pointed to in this statement warrant the attention of your committee. I hope that remedies can be found to preclude similar situations from occuring in the future.

STATEMENT OF HON. JERRY LITTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

I want to thank you for this opportunity to present testimony in support of H.R. 9580, the Social Security Rights Act, a bill to require the Social Security Administration to make decisions on social security benefit claims and payment problems within reasonable periods of time, and of which I am a cosponsor, and similar legislation introduced in this regard.

Because a large segment of the population of the Sixth District of Missouri, which I represent, consists of elderly citizens, my office receives voluminous requests from these individuals seeking my assitance in expediting the processing and adjudication of their claims for disability insurance benefits, retirement and survivor benefits, and supplemental security income payments. While I do everything I possibly can to bring the individual cases to the attention of the appropriate Social Security authorities to request expeditious handling and ensure prompt payment where claims are allowed, a great financial strain is placed on the claimant and his or her family during the long and unreasonable period of time before a determination is rendered. In many of these cases of a long wait at each step of the administrative processing, the claimant has only to learn that the claim has been disallowed for various reasons.

The geographical area of the state which I represent is both rural and urban. I know you can well appreciate the importance to my constituents in receiving prompt handling and consideration of their claims. I feel sure you have also been receiving inquiries from your constituents calling to your attention these same problems and seeking your aid in their behalf.

Getting older each day is something each and everyone of us in life must face from the day we are born. Some of us have been blessed with good health all our lifetime through, others are not as fortunate and have had to cope with serious and frequent illnesses precluding them from being able to work at gainful employment, and leading meaningful and productive lives. I know of many cases which have come to my personal attention where the husband and father is disabled and unable to work at a very early age in life, sometimes at age 35, in the prime of his life, having a wife and several minor children dependent upon him for their total support and everyday needs. These individuals, my constituents, citizens of our resourceful nation, are faced with undue hardships in their efforts (if determined disabled within the meaning of our Social Security laws, and possessing the necessary calendar years quarter of coverage), to obtain benefits which are rightfully theirs through contributions during their working years under the Social Security System, in accordance with the intent of Congress and the particular social security programs involved.

Let's not forget them, lest others forget us someday.

STATEMENT OF HON. TRENT LOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. Chairman, there are countless problems with the current system for the processing and issuance of both social security retirement and disability benefits. Revisions in the law and in regulations relating to the earnings limitation, the disability hearings and appeals procedure and the method for dealing with social security claimants who have had their benefit checks either lost or stolen are desperately needed. I realize, however, that these hearings are confined to the disability hearings and appeals procedure; and I shall restrict my remarks accordingly.

On January 15 of this year I introduced H.R. 1456, which was referred to the Committee on Ways and Means. This is legislation which, among other purposes, is designed to reduce the social security disability benefit processing time. One of the initiating forces behind this bill was the tremendous number of complaints my office had been and still is receiving concerning the inordinate length of time which apparently is required to establish a disability claim and to begin receiving the benefit payments thereunder.

I do not believe all the blame for this situation rests with the Social Security Administration. While any large bureaucracy always has an unlimited number of ready excuses for its mounds of red tape and sluggishness, it is evident that in the case of social security Congress clearly has been negligent in its oversight responsibilities, particularly with respect to the sheer mechanics of the operation. We simply have given too much attention to benefit increases and too little attention to making the system more efficient and less expensive in terms of financial costs to the contributors and delay costs to the beneficiaries.

It is well known that the present state of affairs in the social security appeals process in large measure can be contributed directly to the incredible backlog of disability hearing cases and the resulting intolerable pace at which a claimant's administrative remedies are exhausted. Some solutions to this ridiculous set of circumstances must be found. This Subcommittee has a golden opportunity to discover the exact nature of the obstacles preventing expeditious disability claim processing and an even greater duty to offer ways of negotiating those obstacles.

Several alternative solutions, both administrative and legislative, have been proposed and discussed. My bill would have modified the administrative channels for claim processing by eliminating the so-called reconsideration stage at the State level, allowing claims that have been denied to move directly to the hearing level, facilitating a face-to-face contact with the potential beneficiary early in the procedure.

This remedy, of course, may not solve the massive problems confronting the Social Security Administration today; but it is a beginning point for constructive revision, if nothing else. I would hope and strongly urge this subcommittee to continue the work it is doing on the hearings and appeals aspect of social security, with the ultimate goal of improving the fundamental mechanics of the system. I think that once we get the head traversing in the right direction, the tail will follow.

STATEMENT OF HON. ROMANO L. MAZZOLI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY

Mr. Chairman and distinguished Subcommittee Members, I greatly appreciate this opportunity to speak in behalf of H.R. 8018, which seeks to improve processing of claims under Title II of the Social Security Act at the reconsideration and hearing levels.

Since coming to Congress, I've become increasingly distressed and concerned about the time involved in resolving Social Security disability claims.

In some instances, I've seen individuals wait as long as three years before receiving a final determination on their claims. And, quite sadly, I've found a one to two year waiting period for final resolvement to be the rule rather than the exception.

Disabled citizens who are in need of financial assistance should not be forced to wait one, two or three years before receiving their much-needed benefits. Likewise, applicants who are capable of gainful work should be denied their claims as promptly as possible.

As we are all aware, the tremendous backlog of claims exists at the hearing level. Many disability claims should never have reached this stage of development. They should have been resolved—with an approval or a denial determination—at the earlier stages of development.

The fact that these claims unnecessarily reach the hearing level causes undue hardship for the claimants and the Social Security Administration. The claimants are inconvenienced because their claims are left "hanging in the balance" unresolved. The Social Security Administration is inconvenienced because the valuable time of their administrative law judges is wasted on claims they should never have received (not to mention the "headaches" caused the Social Security Administration through recurring Congressional inquiries and claimant inquiries).

Examples of a few of my constituents' disability claim problems will serve to illustrate this dual Social Security Administration/disability claim applicants' problem.

Mr. P. filed for disability benefits early in 1973. The case is still pending with final resolvement not likely in the very near future. Now that his claim has reached the hearing level, the administrative law judge has been forced to request additional medical evidence—a procedure which should have been followed at the early stages of development.

It's questionable as to whether Mr. P is entitled to disability benefits. However, it is not questionable that the case should have been resolved much sooner. Had his claim been properly developed at the earlier levels, it would have been resolved.

This case clearly points to the problems experienced by the Social Security Administration in its work on disability claims, and it points to the problems experienced by applicants.

If applicants are entitled to disability benefits, they should receive an approval determination and their benefits as soon as possible; if they are not entitled to these benefits, they should receive a denial determination "early in the game" so that there is no question about their disqualification.

Another constituent, Mrs. M., filed for disability benefits in February of 1973. Her hearing was scheduled and heard in July of this year. To date, no decision has been rendered.

In this particular case, Mrs. M. applied for and was approved for assistance under the Supplemental Security Income Program. Eligibility for assistance under S.S.I is determined by the same criteria used for eligibility under the disability insurance program. Yet, Mrs. M. has endured two long years in attempting to resolve her disability claim.

It would seem that in this case, as in the case of Mr. P. above, the problem centers around poor development at the early initial and reconsideration levels.

The case of Mrs. X. points more specifically to the unfortunate results of disability claim handling for applicants themselves. Mrs. X. contacted my office early in 1974. She was a terminal cancer patient. Her disability claim was denied originally and upon reconsideration. When her claim reached the hearing level, however, it was approved. Unfortunately, Mrs. X. never lived to receive one penny of the benefits to which she was due.

I'm of the opinion that these serious disability case problems can only be remedied through legislative action. H.R. 8018—which I've co-sponsored—goes to the heart of the problem by insuring that all disability claims are fully developed at the beginning, thus reducing the number of claims appealed to the hearing level. By doing the job right at the start, a lot of time will be saved along the way.

Therefore, I strongly recommend—and respectfully request—the members of the Subcommittee favorably report H.R. 8018 to the full Committee.

In closing, may I commend your ongoing investigation into the problems of the disability insurance program. I, along with Congressman Sisk and the many co-sponsors of H.R. 8018, thank you for your attention to our concerns.

Statement of Hon. John Melcher, a Representative in Congress From the State of Montana

Mr. Chairman: The serious delays in processing Social Security appeals by the Social Security Administration have adversely affected many of my constituents in the second district of Montana. Elderly and disabled people are finding it extremely difficult to make ends meet while their appeals are being processed. Many have to rely on welfare, food stamps, medically needy programs, and help from private charities to survive. This is particularly true in cases of disability.

I welcome this opportunity to speak to the urgency of reforming this aspect of the Social Security administrative process. Those who have paid into the system's trust fund through payroll tax deductions have every right to expect that when they need the benefits to which they are entitled, their cases will be heard without undue delay. In many cases, appeals take a year or longer.

A most poignant example of the desperation wrought by the delays in the system came to my attention in a recent letter from a constituent. He filed for a hearing on his claim in July, 1974 and was granted a favorable decision on August, 1975. If everything goes well, at least another six weeks is required for processing his first payment. It could be even longer, perhaps into November. 1975, or nearly 18 months since his appeal was first filed.

"I do not know how one with a disability is expected to survive. If it were not for my family in Hysham and Billings I don't know what would happen to myself and my children. It seems very unfair to me, that someone else should have to support me and my family when I have Social Security insurance for just this reason.

"I am not looking for welfare or a handout, but only what I am entitled to under law as a citizen. I only wish that I was able to work as I always have, but realize this is impossible.

"It is bad enough to be faced with a medical situation such as mine without having the financial worries over my children and myself. I feel very sorry for others in my situation who have no one to fall back on for support."

I am speaking on behalf of many citizens of Eastern Montana to urge that this Subcommittee adopt a measure to streamline the Social Security appeals process to make the system work for those who need it and who have earned it. Otherwise, they will continue to face loss of pride in having to rely on charity and welfare and loss of pride in not being able to provide for their families. Let us restore the faith and trust of the American people in the system that is supposed to be there when they need it by eliminating these unaccountable delays.

Your kind consideration of these comments is deeply appreciated.

STATEMENT OF HON. JOE MOAKLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman, our vast and complex bureaucracy is striking the hearts and pocketbooks of many of our most needy citizens. I refer to the tremendous backlog of cases at the hearing and appeals level within the Social Security Administration. Currently there are about 107,000 hearing requests pending before the Social Security Administration's Bureau of Hearings and Appeals. This figure represents approximately one year's backlog of cases.

Pending appeals cases have steadily increased since 1973, reaching a high of over 113,000 in April, 1975. In the Boston area alone we have 1215 pending requests for hearings. The future does not look very encouraging. There is a drastic need for Congress to give more attention to the problems faced by Social Security recipients. It seems ironic that we allow people who are desperately seeking Federal assistance to wait indefinitely for their cases to be heard through the Social Security appeals process.

For many citizens, an encounter with the Social Security Administration may be their only active contact with a government agency, Individual citizens have encountered so many delays as a result of current appeals procedures, that they become disillusioned and frustrated with the system created to serve them. Their justifiable anger and disenchantment only leads to a lack of faith in the Federal government. This is one of my reasons for strongly supporting and testifying in favor of H.R. 8018.

Implementation of the reforms detailed in H.R. 8018 is a necessity if we are able to abolish the current inadequacies in the Social Security appeals system.

Specifically, this bill establishes a procedure which will cut through the present backlog of Social Security cases and maintain a system that will accommodate future cases.

An important change must take place at the initial level. Presently a claimant will receive a "standard form rejection" notice without explanation as to why he or she is rejected. Confused, worried, and frustrated. this claimant will naturally keep appealing to the Social Security Administration to find the reasons for the rejection. This is where the backlog problem begins. H.R. 8018 would help to correct this problem, by notifying the claimant of the factual and legal basis upon which the claim has been denied.

Another important provision of H.R. 8018 is the section mandating face to face conferences at the reconsideration level upon a claimant's request. It is my feeling that requiring that rejection notices be explained will make the claimant feel satisfied that he or she has received a "square deal". If the claimant still feels the need for further review before an Administrative Law Judge (ALJ) the conference information will be added to the individual's information.

H.R. 8018, by revising administrative procedures at the initial and reconsideration levels of the Social Security appeals system would allow for greater efficiency at the ALJ stage. Currently, many of the cases that appear before the ALJ have not been adequately developed at the two lower levels. Thus ALJ must spend a long, tedious amount of time preparing the case properly in order to give the claimant a fair and just hearing.

Mr. Chairman, H.R. 8018 is long overdue. This legislation would go a long way toward correcting the administrative indifference which marks the present procedures of the Social Security Administration. No longer should there be a need for me or for any other Member of Congress to receive constituent mail stating: "I had to wait 3 months to receive initial Social Security applications, 3 months for a reconsideration of my case, and 5 months for a hearing before an Administrative Law Judge."

Along with the other 56 sponsors of H.R. 8018, I believe that passage of this measure will correct the injustices of the current Social Security Appeals system.

STATEMENT OF HON. BILL NICHOLS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. Chairman, I would like to thank the Committee for this opportunity to convey to you the problem of severe backlogs in the hearing of Social Security cases in my state of Alabama.

At this time, cases for Social Security hearings usually have a nine month waiting period in the Birmingham office and this is up from six months just a short while ago. I know this is not an unusual case for other Members have told me that in their state the wait is anywhere from six to twelve months.

Just this week my office contacted the Administrative Law Judges office in Birmingham where a great number of the hearings are conducted from my District. The people in this office were most helpful in giving me information for this statement, but I must admit to you in telling their stories to me their voices had a tone of frustration and discouragement. We were told that the employees at this office felt as though they had their hands tied for there was literally nothing they could do to speed up the casework. Basically the problem lies in the fact that many more cases are submitted each month than the five Judges can handle. On the average 130 cases are sent to the Birmingham office each month. Of these cases the Judges are capable of handing down decisions in 75 cases on the average, as well as doing preliminary work on many other cases.

At this moment there are more than 300 cases backlogged in the Birmingham office which have not even been put on the calendar for a hearing. This figure includes cases in the immediate Birmingham area plus some 150 cases over the state which will require some travel for the case to be heard.

And even with the increasing backlog is the ever increasing number of people apply for benefits under Social Security. More people than ever are aware of the benefits available to them which is one reason for this upswing in applicants. I am also sure that the economic situation is another reason for the increase in cases. Also more cases are being appealed to higher levels because of the favorable percentage of cases approved in the courts.

Both my Administrative Assistant who often accompanies the constituent to the hearing and the Judge's office tells me that at least forty percent of those cases heard at the higher level are approved and this would prove to be an incentive to those turned down at the lower levels of the Social Security bureaucracy.

Mr. Chairman, Members of the Committee, I cannot tell you the distress of the long waiting period as related to me by my constituents. In many cases, the applicant gets progressively worse during the waiting period and this places an undue hardship on the applicant and the members of his family.

I would like to urge you to act expeditiously in this matter for Alabamians and Americans across the country will surely benefit by your action here.

Statement of Hon. Richard L. Ottinger, a Representative in Congress From the State of New York

Mr. Chairman, I appreciate the opportunity to submit these remarks in conjunction with the hearings you are holding to try and arrive at some way of alleviating the terrible hardships brought about by delays and backlog in the Social Security appeals process.

Testimony presented and materials gathered in preparation for these hearings reveal that there are presently well over 100,000 cases pending before the Social Security Administration's Bureau of Hearings and Appeals. In July of this year the median time period for the processing of a disability appeal was 7 months. This means, of course, that half of these cases take more than 7 months to complete, and many of them take up to a year and a half. That is a long time to wait for benefits for someone who is entitled to them and is so severely disabled as to be unemployable.

We know that the overwhelming majority of appeals cases are for disability benefits, and this is understandable in view of the fact that true disability because of either physical or mental incapacitation is often difficult to establish with great accuracy. Nevertheless, it is absolutely essential that we devise some plan for insuring the prompt processing of disability claims in order to protect the rights of the growing number of individuals who become eligible for disability benefits each year. In 1974 more than 1,112,000 workers and their dependents became eligible for Social Security disability.

Numerous proposals for steps to resolve the present crisis have been put forth in recent weeks. I would like to take this opportunity to repeat some of the suggestions that I personally find most practical and to add one or two points of my own that I believe merit some consideration.

In the first place, I fully support the proposals for reducing the amount of time allowed for filing an appeal. The present six-month option periods are excessive. There are strong indications that a substantial number of cases are appealed only toward the very end of the six-month period, and in many of these cases a reversal of the prior decision takes place because the claimant's condition has deteriorated substantially during that time period. By reducing the time in which a claimant may file an appeal, we will eliminate many of these situations in which a disabling condition deteriorates, and in those cases where there is a worsening of the disability, the claimant can file a new application and avoid the costly and time-consuming appellate stage.

Another aspect of the present backlog and delay is processing of these cases that concerns me greatly is the rate of reversal at the appeals level. Nearly 50 percent of all unfavorable disability decisions are reversed on appeal—truly an alarming figure. During the first half of 1974 approximately 42.5% of all reconsideration cases in New York State were reversed. While it is doubtless true that this problem is partially attributable to the ability of many claimants to prove disability on the basis of a condition that has worsened during the interval between the initial decision and the appeal, I think a 50% reversal rate indicates that there are additional problems that must be recognized.

In the years that my staff and I have assisted constituents in their appeals, it has become increasingly apparent to me that most claimants for disability are totally unaware of what is required under the law to establish unemployability for purposes of Social Security. I would suggest, then, that certain administrative steps be taken to provide the public with greater information as to the type of documentation that is needed to prove disability, Much time is lost when Administrative Law Judges have to tell claimants to seek better documentation and return at a future date to complete an appeal. If a claimant knew in advance exactly what medical and other evidence is required, he could come to the hearing stage properly equipped to present his case.

In this regard I believe we should definitely consider making provisions for SSA to hire more support personnel to screen evidence and insure that all documents are in order before the Administrative Law Judge begins his task. Certainly we should try to relieve the judges from as many non-judicial functions as possible and leave them free to use their time to perform the most essential part of their job—hearing the case and acting on it.

Mr. Chairman, as you know, I am a co-sponsor of Congressman Sisk's bill, H.R. 8848, which provides the following measures as a means of alleviating long waiting periods and present backlogs:

1. a thirty-day period in which a claimant who has been denied benefits may request reconsideration, including an informal conference and a statement of the case, prior to hearing;

2. the imposition of reasonable time limits for determinations on such claims;
3. the establishment of Administrative Law Judge positions at grades not lower than GS-16.

It is absolutely imperative that this Congress take prompt action to eliminate the Social Security appeals backlog and reduce the waiting period before benefits can begin to be paid. I hope that with the conclusion of these hearings the subcommittee can move swiftly to analyze its data and report out measures to help resolve these problems. For my part, I can assure you that I will support any reasonable proposals that grow out of the hearings. I am happy to have had the opportunity to share my views with you, and I look forward to working with you in the weeks ahead toward getting some effective measures through Congress.

STATEMENT OF HON. RICHARDSON PREYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, I would like to join my colleagues in expressing my deep concern about the extreme delays my constituents are experiencing in the processing of their Social Security claims. I want to stress that these problems do not result from the offices in my District which have always been helpful and responsive.

The Social Security caseload in my office has doubled in the past few years, mainly, I feel, because of the Social Security Administration's unresponsiveness in dealing with these claims. Most of these problem claims have been filed with the Bureau of Disability Insurance (BDI) or the Bureau of Hearings and Appeals.

It is not unusual for claimants in my District in North Carolina to wait 8 or 9 months for a hearing to be held or a decision to be made. By that time, these people are understandably bitter and highly resentful of the bureaucratic system. This experience is not only frustrating, but many times results in financial hardship which could be avoided by a speedy review or hearing. I believe it is important for us to remember that, other than paying taxes, this may be one of the few direct contacts many people have with their government.

I am sure that the problems in my area are not much worse than those in other parts of the country, but I would like to share with you a few of the Social Security cases that have been brought to my attention. While I realize that recipients have no difficulty in getting their monthly checks on time and their claims heard, I have found that this efficiency has been rapidly decreasing in the last few years.

Anyone examining my Social Security files will find a number of cases which have taken several years—not months—to resolve, and some which are still going on. Recently, I was called by a frantic constituent whose claim, which has been turned down by the Appeals Council, has been languishing in court for five months because the Appeals Council has not sent the court the Social Security records on this case! This man's lawyer advised his client to contact our office as a last resort but admitted that the Congressman's office probably won't be able to get them either.

Another man, a World War II veteran, who has had numerous serious operations and walks with great difficulty and who according to all authorities, is extremely disabled, has been trying to get disability benefits since 1973. It took 8 months for him to be notified the first time that his claim was turned down. A request for a hearing was filed in April, 1974, which was finally held at the end of September last year. Finally in March, 1975, the Administrative Law Judge issued a decision upholding the original decision. The claim has since been appealed to the Appeals Council, where it was still pending, according to my last report, from Social Security, dated April 29, 1975. You can imagine the letters that must have come in and gone out of my office since this case was first called to my attention back in February of 1974 and this matter has still not been resolved. This type of treatment from Social Security is becoming more and more common and this case is no longer an isolated incident. I am not complaining about the decisions in these cases, as that is strictly up to the Social Security Commissioner and his staff, but it is hard for my staff and me to understand why we are kept waiting weeks and months to learn just the status of a claim.

I would also like to comment on the procedure for issuing checks that the Social Security system has established regarding those accounts which must be corrected or changed for some reason. I am always upset when a constituent calls to say that he or she has not received a monthly check because I know that it will take more than a few days or months for a Social Security check to be replaced or an address to be correctly changed by the agency. The procedure for replacing a check seems quite baffling and the problem can never be pinpointed to a specific office, either in the Social Security Administration or the Treasury Department. Problems are always blamed on that unreachable computer which can never be programmed correctly. One of my constituents, who first contacted me in early 1974 about not receiving his check, still has weekly conversations with me and my staff about his account. That computer still does not have his claim in regular payment status. Not only does the computer monthly reject this account, because of past case history, we are told, but no one at Social Security bothers to make sure that his check is manually processed each month until the problem is corrected.

Even though my staff and I spend a lot of unnecessary time chasing down Social Security claims, it is still the constituent, the taxpayer, who in the end gets hurt by these unnecessary delays. I certainly hope that this Committee will come forward with some effective changes in this system.

STATEMENT OF HON. JOHN J. RHODES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. Chairman and distinguished members of the Subcommittee, the intent of the social security programs is to provide insurance against loss of earnings in the event of retirement, death or disability. At the present, this intent is not being carried out. Long procedural delays make benefit payments unreliable. An unreliable source is certainly not an insurance for someone retired or suddenly disabled or faced with the loss of a provider. Congressman Seiberling has offered a solution in his Social Security Rights bill, H.R. 9581, of which I am a co-sponsor.

Last March I received a memorandum from my District office in Phoenix seeking relief from the innumerable delays in the social security benefit payments process. At that time, the Phoenix office had fifty cases pending, some as far back as 1974. As a precaution, my constituents nearing retirement have been advised to notify the Social Security Office three months before retiring in order for the first check to arrive on time. Recipients, following that advice, still experienced a 4–5 month delay *after* they retired before the first check arrived. Disability payments prove to be an even greater problem. Whereas five months was a normal waiting period before receiving a disability check, a person was then having to wait up to 10 months after the disability claim was approved. Even greater delays are encountered during the claims hearings and decision process.

Time and staff limitations aside, the payments procedure itself must be modified in order to provide social security recipients a dependable source of income.

Under H.R. 9581, the person who finds his monthly benefit payments interrupted for no apparent reason would have recourse action. If the check does not arrive within five days of the fixed date, he would submit a request to the Social Security Administration for a replacement check. The Social Security Administration would then have 10 days in which to issue a duplicate check or detailed explanation for the delay. He would not have to go "begging" to relatives for money as one of my constituents did to tide her over until she received the check.

Under H.R. 9581, the person who files for social security benefits would know that the Social Security Administration would have to act within 90 days. He would not encounter the unconscionable delay that one of my constituents experienced when she as a widow filed in September 27, 1974, for social security benefits, but did not receive them until May, 1975. My constituent was involved in an initial claims decision. This bill also provides time limits for hearing requests and appeals review.

Finally, under H.R. 9581, the person who has had his disability or other benefits approved would have a recourse to take if his check does not arrive within five days of the scheduled date. Upon request, he would receive a replacement check within 10 days. He would not be faced with unpaid bills, as was one gentleman in my District who had to wait seven months before receiving his check on time. Meanwhile, he had to go into the hospital. Since he had no other income, his bills just piled up.

The emergency payment procedures are desperately needed as I am sure all congressional members are well aware from their own constituents' complaints. Therefore, I urge your favorable consideration of H.R. 9581.

STATEMENT OF HON. ROBERT A. ROE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman, as a co-signer of a July 21, 1975 letter to you requesting that the attention of this Subcommittee be given to the current situation involving the processing of Social Security Appeals cases, I am pleased and privileged to join with my distinguished colleagues in the Congress who support substantive and expedient rectification of the delay problems affecting so many of our constituents and which are the subject of your hearings today.

I firmly believe that a process which proves more frustrating than productive and efficient for the intended beneficiaries of that process demands assessment and constructive, effective revision. The current delays and tremendous backlogs which are characteristic of Social Security appeals cases is a glaring example of an inadequate process and implementation of intent which compels your priority attention. I believe this Subcommittee, by holding these hearings, is taking a first positive step in exposing the extent of the problem and, hopefully, in helping to resolve the frustrations and inefficiencies as they now exist within the system. And, at this point, I would like to express my sincere appreciation to you, Mr. Chairman, and to the members of this Subcommittee for your prompt response to our request that these hearings be scheduled following your hearings on the financing of the Social Security Administration. It is truly an urgent matter.

The urgency becomes apparent in numbers alone, as well as in the turmoil in individual lives which the numbers so tellingly reflect The Honorable James B. Cardwell, Commissioner of Social Security Administration, in testimony given before the House Select Committee on Aging Subcommittee on Retirement Income and Employment last April, cited the extent of the backlog problem. He noted that claimant appeals of all types are rising and that "workloads are growing faster than our capacity to deal with them, particularly the hearings and appeals workloads." He went on to note that as of March 31, 1975 there was a backlog of 196,000 applications for social security disability insurance benefits; hearings requests pending in the SSA's Bureau of Hearings and Appeals since the beginning of 1975, he stated further, were over 110,000 cases, an increase of over 30,000 from the previous year. Finally, he concluded, "given the circumstances under which the present system functions, regrettably, this (reduction in backlog) is not going to take place very soon." In my own State, New York, the situation reflects the national scope of the problem. According to the Branch of Management Information, Bureau of Hearings and Appeals (SSA), in New Jersey, as of August 15, 1975, there was a backlog of cases at the initial filing stage of 9,400 (1,200 in the Eighth District which I represent). In addition, there were 900 claims within the State at both the reconsideration and hearings level—a total of 1,800, just in New Jersey alone! This situation cannot be allowed to continue and should try the tolerance of the most patient among us.

I am aware that there are several hundred bills dealing with the issue of the appeals process for Social Security claims pending before this Subcommitee. I am a sponsor of some of these measures. I particularly call your attention to my bill H.R. 8848 which would amend the Social Security Act to provide for, among other things, an informal conference at the reconsideration level and for the imposition of a definite time frame in which the appeal must be made and resolved. I believe this bill addresses one of the areas from which many of the difficulties have arisen—failure to communicate a resolution of a claim to the claimant within an acceptable and realistic period of time. I say realistic because the unconscionable reality is that, because of administrative backlog resulting in delays up to three years in some cases, thousands of people are being denied, for no *substantive* reason, the benefits to which they are so rightly entitled. This delay is all that much more devastating in that, not only are these claimants suffering in terms of patience, but in many cases, in terms of the necessities of life. *Ultimate* positive resolution does not lessen the intolerable financial deprivation the system, as it is now, imposes on these people in their daily existence.

It is essential, not optional, that reform take place and this Subcommittee has before it many of its own options to effect this essential reform. I urge, then, that you work quickly and judiciously to evaluate those options of reform—for the need is self-evident in the numbers—before you and, based on these hearings, recommend a truly effective resolution of the problems pervading the appeals cases' process. I believe we have a responsibility to insist that benefits are denied or delivered within a reasonable period via a system which not only reflects efficiency and fairness but also a sensitivity to the immediate and individual needs of its beneficiaries. To us the delays are distressing; to the claimants, they are debilitating.

Mr. Chairman, I assure you of my strongest support in this endeavor. I truly believe anyone exposed to the magnitude of the problem can not but be impressed with the urgency it dictates for resolution. The needs and numbers of claimants for Social Security have outgrown the process which was intended to handle these needs and numbers and, as such, has become more of a burden of frustration than a vehicle of facilitation. It is up to the Subcommittee to recommend the particular refinements which will constitute true reform. The need for this reform does not reflect a failure in the development of a system but rather acknowledges the adjustments that must be made to accommodate the maturity of a program such as Social Security. It should be apparent that no such accommodation is being made or is possible, given the current process for appeals cases being heard.

STATEMENT OF HON. J. EDWARD ROUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Dear Mr. Chairman, it is a pleasure to submit testimony to you today concerning the processing of claims for benefits administered by the Social Security Administration.

I am, in fact, testifying in behalf of my constituents in the Fourth Congressional District of Indiana, who are currently facing a nine and one-half month delay in the processing of their social security claims.

I have pursued this problem with the Social Security Administration itself. In a June 11, 1975 letter to me in response to my inquiry as to the reason for such delays, Commissioner James B. Cardwell informed me, "According to the latest figures available, the average time from the date a hearing is requested to the date of the disposition of the case by the hearing office is 269 days for Region V."

This situation is intolerable, and I urge this committee to take immediate steps to rectify the situation.

I have been informed that most cases adjudicated by the Social Security Administration are disability insurance cases.

In view of this information, it is doubly alarming to discover the delay claimants are facing while awaiting the administrative process to be accomplished.

Individuals filing disability claims are those our system is designed to protect and assist with the highest priority. These are the individuals who, under the law, must have a severe disability which will either totally disable them for twelve months, or is expected to result in death.

To force these almost helpless individuals and their families to face an interminable wait for financial assistance, which under the law they are entitled to receive, is not only intolerable, but goes against our national spirit of humanitarianism and equity.

I have had some constituents wait for as long as two and one-half years for a final decision. In many of these cases, a favorable decision is finally reached.

Because of the long periods of time my constituents have endured in the social security appeals process, I have discussed this matter at various times with local social security personnel, and SSA administrative law judges and other supportive personnel.

From my research, the major problems affecting my constituents appear to be:

(1) Too long a period of time for claimants to appeal a denial.
(2) Difficulties with claimants proving age.
(3) Too much paperwork required by the SSA for record-keeping.
(4) Physicians not providing complete and correct medical reports.

I would like to elaborate on this fourth point as this appears to be a major problem not only in my District, but throughout the United States.

The problem seems to be two-fold: the SSA has not informed physicians what information is specifically needed to support a disability claim, and secondly, the physicians do not provide that information on a timely basis or in complete form.

I have been informed by some administrative law judges, that doctors have been known to submit prescription lists, receipts and other such miscellaneous material instead of complete medical analyses.

Therefore, there must be some type of remedial action taken to inform doctors of the kind of information requested, and to assist them when questions arise.

Another problem claimants face with medical evidence is the mandatory cost they must pay for physicians' fees to gather their evidence. Most doctors appear to charge between $10 and $15 for one such report. By the time a claimant is facing his third disability appeal, and has been consistently informed his medical evidence does not support his claim, he has paid $45 for a medical report which should have been complete initially. By the time he finally is awarded his disability payment, he owes a substantial part of that payment in unnecessary medical bills.

Not only does this deficiency cause a delay in final disposition of the case, but it places an additional financial burden on the claimant, and an added burden on our medical community.

Administrative Law Judges have also informed me many doctors are uncooperative with the Social Security Administration. This problem of attitude, while it may be one which is difficult to deal with effectively, cannot be ignored by this committee.

Because of this negative response on the behalf of doctors, many administrative law judges have had to wait, 180 days for the receipt of medical reports. As stated earlier, when these reports do finally arrive, they are often incomplete.

I have been informed that the submission of evidence is often more timely if administrative law judges use the threat of a subpoena when requesting information from doctors.

I urge this committee to take immediate steps to pass enabling legislation to correct the deficiencies outlined in its three days of hearings, in submitted testimony, and in the conditions I have specifically outlined in my statement.

Our country's deep pride in taking care of those unfortunate individuals who find themselves with severe disabilities is one which is well-deserved. To deny these individuals what is legally theirs by bureacratic delays is abhorent and must receive corrective action of the highest priority.

STATEMENT OF HON. FERNAND J. ST GERMAIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

I would like to thank the Chairman and Members of the Subcommittee on Social Security for this opportunity to present my views on the urgent need for reform in the hearings and appeals process of the disability claims handled by the Social Security Administration. As I am sure will be repeated many times throughout these hearings, this area is one which has caused much consternation for those persons attempting to obtain disability compensation who are trapped in the merry-go-round of the appeals proceedings.

As perhaps any Congressional staff caseworker can testify, a great amount of time and effort is devoted to tracking these appeals cases through the system. Obviously there is some value in this complex arrangement which I am sure discourages many would-be appellants from further clogging SSA's backlog; however, in the interest of justice, I maintain that legitimate appeals must be granted in a reasonable time so that persons whose existence may depend on receipt of the Social Security check are not left without proper recourse.

There are several areas which demand reform and reappraisal. Of primary concern, the multi-tiered appeals system immediately needs additional personnel, particularly Administrative Law Judges who can help reduce the hearings caseload which currently exists. Let us attend to this at once.

But we must also act to insure that a similar situation will not reoccur. Certainly, a 55% reversal rate of state decisions is a strong incentive to pursue the appeals route through to the end. If 55% of all decisions which have been rejected can be reversed, upon what basis were these decisions made in the first place? Was the information initially supplied not sufficient; is there something inherent in the initial state consideration which makes it less than adequate to the needs of the claimant? Studies tell us that the condition of a claimant tends to worsen over time, so that by the time a hearing before an ALJ is scheduled (as much as one year after initial determination), and the claimant appears personally before the ALJ (the first time for such face-to-face contact since the claim was filed), there is a greater likelihood of reversal. Also, it is apparent that the records which are supplied in support of the claimant's case at the state level are incomplete when compared to the more extensive data required and received during a hearing. Many times the claimant is unaware of the inadequacy of supporting statements from, for example, medical personnel and is not informed of the reasons why the claim was rejected.

I believe we can infer from this that there are substantive changes which must be made in the state Social Security offices, including: more offices, more staff ,more in-depth initial considerations, more face-to-face contact during initial consideration.

Also, there must be more information made available to all participants in the Social Security system so that they will fully understand how the system operates. This applies certainly, but not exclusively, to the appeals process. I would hazard a guess that a very slim minority of our population comprehends what the rights of a disability claimant are. From the mail which I receive daily from constituents, it is clear that the information concerning a case which reaches the claimant is minimal, uncommunicative, and impersonal. The form letter which includes only a Social Security number and possibly the claimant's address is a far from adequate response to an individual who is perhaps ill, worried about lack of income and unsure of what alternatives are available at any point in the process.

I believe it is the responsibility of the Social Security Administration to make the claimant aware of the procedure at all levels of processing. If this is supposed to be a service to participants, then we must make it more than a shuffling and reshuffling of people and paper. Therefore, I would like to see a concerted effort on the part of SSA to provide detailed information to the claimant. Obviously, this should be done for every program at every level of SSA, so that a person will understand what must be done to receive pension benefits or will know how the amount of the disability/unemployment/pension check was determined. These should not be a mystery to Social Security participants, but should be clearly explained to each person.

Perhaps the only and most substantial argument opposing these suggestions is funding. As we all know, the inadequacy of the trust funding system for SSA has been made apparent, but remains unresolved. Clearly, the time has come to address these problems and, if SSA requires extensive overhauling, then let us begin the reconstruction. Let us demystify the internal workings of Social Security so there is a clear understanding on the part of administrators and recipients as to how we can work together to repair a system which is inadequate to bear the swollen burden of cases with which it must contend. In this way, the backlog would hopefully disappear, the disability claims would be processed efficiently and with due care, and the claimant would be better informed and confident of just treatment.

In conclusion, let me reiterate my gratitude to the Chairman and Members of this Subcommittee for holding these vital hearings and for allowing me to present this testimony.

STATEMENT OF HON. CHARLES THONE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. Chairman, there is no question that the individual in pursuit of social security disability insurance must be provided with a fair and impartial hearing under the provisions of the Administrative Procedures Act (APA). Congress, therefore, must enact legislation to assure that a claimant does receive a fair hearing by setting forth the application of the APA to Social Security hearings.

It is up to Congress to put a stop to the current efforts to destroy the due process of law evidenced in the Social Security hearings and appeals procedures. For one, the present backlog of cases cannot be tolerated much longer! According to a recent study, the average time spent on a disability case from application to award or final administrative denial is more than a year and a half. And half of this time is spent in the hearing process. Furthermore, the number of cases reversed on appeals has been increasing and the Social Security Administration (SSA) has stated that it is playing a growing role in the actuarial deficiency in the disability insurance program.

Another problem of equal importance is the quality of adjudication. Today, the Social Security Administration is distributing $200 million and maybe much more in disability benefits to individuals who are capable of engaging in gainful work. This money which could be given to disabled individuals imposes a tremendous burden on the taxpayer and contributes toward the social unrest and public cynicism which any unfair program generates. This drain on the trust fund caused by erroneous allowances will undoubtedly continue until Congress takes some action.

Reform is necessary and the pending legislation, H.R. 8018, is a step in that direction. This legislation makes a direct attack upon the case backlog problem and points to where it really exists—in the initial and reconsideration stages of the proceedings. In order to speed up the adjudication process, the bill calls for a reduction in the time period for filing a request for reconsideration from 90 to 30 days. The claimant is also provided with the opportunity to have an informal conference in which he can present his views, submit documentary evidence, and supply leads for additional documentary evidence. Under the bill's provisions, the Social Security Administration would be required to investigate all new and potentially relevant evidence before the reconsideration determination. In the past, the Administration has allowed large numbers of inadequately developed cases to progress to the hearing level without the basic factual investigation which is essential for sound adjudication.

According to H.R. 8018, any Social Security disability insurance hearing shall be held before an Administrative Law Judge (ALJ) appointed under the provisions of the APA. It is my belief that each claimant deserves to have a hearing before a truly independent administrative law judge for this is the claimant's only hope for relief. The current lower grade for ALJ's is unfair and would be amended by H.R. 8018 so that every ALJ shall be classified as not less than GS-16. Today, one of the greatest causes of low morale among the ALJ corps in HEW is the low pay which results in a continuous departure of ALJ's to higher-paying agencies and a consequent training expense of new ALJ's. Another innovation contained in this legislation is that the Secretary of HEW must provide the claimant with a written statement of the detailed reasons why his initial denial must be affirmed. This detailed statement would outline the evidence considered, the law and regulations pertaining to the claim and specific reasons for the denial of the claim. Thus, the backlog of cases could be reduced by a Department statement which clarifies the issues on appeal or eliminates the request for a hearing entirely.

Other legislation proposed in this regard is H.R. 8911. In my opinion, this bill is an assault upon the due process rights of Social Security applicants for it denies them a fair and impartial hearing by a qualified Judge appointed under the provisions of the APA. The Secretary of HEW should not be granted the power to appoint noncredited APA lawyers as hearing examiners to conduct APA hearings. In hearing Social Security disability insurance cases, judges must be able to operate independent of Agency control and thus the Agency should not be allowed to prescribe the qualifications for appointments or engage in selective hiring practices. If H.R. 8911 is passed, the hearing examiner's impartiality will always be suspect. This will certainly cause more appeals to go to the Federal courts and retard the reduction of case backlog.

The creation of temporary hearing examiners is not a proper solution to the backlog problem. Sloppy administration of justice must not be substituted for the sake of prompt hearings. If more judges are needed, then more and better ones will be found by raising the present pay scale as provided in H.R. 8018. It seems more feasible and equitable to enlarge the administrative law judge corps of the SSA to hear the growing number of claims, rather than allow the Secretary to appoint lesser-qualified individuals. I do not believe that H.R. 8911 would correct the present deficiencies in the hearing process; I fear that it would only continue the existing hopeless procedures.

In conclusion, I believe that H.R. 8018 is a direct attack against the case backlog problem. It provides some of the reforms necessary for better appeal and hearing procedures within the SSA. However, testimony from these hearings should be carefully considered in light of possible amendments to this legislation. It must be the goal of the SSA to grant benefits as promptly as possible to the individual who is truly disabled and to deny those benefits to the applicant who is capable of gainful work.

STATEMENT OF HON. G. WILLIAM WHITEHURST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman and Members of the Subcommittee, I appreciate very much having this opportunity to testify before the Subcommittee on Social Security. I want to commend the Chairman for holding hearings on the problem of delays in processing Social Security claims. Surely the tremendous backlog of cases awaiting processing, and the sometimes unconscionable delays caused by this backlog are very real problems that directly affect each Member of Congress. Each year, my staff and I handle dozens of Social Security cases, and very frequently it takes months to get a case resolved for the constituent. To the individual awaiting a hearing or reconsideration review, these can be months of uncertainty, anxiety, frustration, and even near poverty.

It's all too easy to lump hundreds of pending cases together and label them a "backlog." This word makes the whole thing sound like an impersonal, administrative problem. Backlog becomes a convenient word that tends to make us forget that each one of these hundreds of pending cases involves a real person with very real needs. It's in the interest of that individual that we must take some positive steps to reduce the amount of time it now takes to process a Social Security case. I believe the Congress is demonstrating its willingness to help solve the problem by holding these hearings.

I've read the statement drafted by the Association of Administrative Law Judges, as I'm sure the Members of this Subcommittee have, and I can certainly appreciate their concerns. I believe the Director of the Bureau of Hearings and Appeals must do everything possible to decrease the case load that is now placed on the Administrative Law Judges (ALJ's). By hiring additional clerical workers and assistants for the judges, I believe their workload will be drastically cut. It's both inefficient and time-consuming to force the ALJ's to spend time collecting background information on cases when they could better spend that time in the court room.

A recent survey conducted by the Bureau of Hearings and Appeals showed that between 25 and 50 percent of the pending cases constituting the so-called backlog had not been properly investigated and were therefore not ready for hearing. We should not expect the ALJ's to correct these deficiencies. Rather, the whole process of investigating claims should be left up to well-trained assistants. In addition, the Congress should appropriate funds so that more ALJ's can be hired in addition to the increases in their staffs.

Today, a typical appeal can take over a year to process; an average of three months for the initial application, three months for a reconsideration review, and between nine and twelve months for a hearing before an Administrative Law Judge. Surely, we ought to be able to devise a more efficient system. Improved techniques and increased personnel across the board could be the solution. However, the Congress must continue to exercise its oversight responsibilities through hearings of this kind to promote efficient handling of these cases and to help ensure the prompt and courteous treatment the people deserve from the Social Security employees.

STATEMENT OF HON. LESTER WOLFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, as one of the 73 Members who signed the letter to Chairman Ullman requesting hearings on reform of the Social Security appeals process, I want to thank your Subcommittee for its response to our request and for the opportunity to submit this testimony today.

I know that there are several hundred bills pending before this Subcommittee dealing with the issue of reform of the appeals process for Social Security claims. My purpose, however, is not to discuss the merits of any particular piece of legislation, but rather to state for the record the problems as I have seen them in my own State of New York. The extreme backlog of appeals cases in New York and the many constituent complaints I receive daily are by no means peculiar to my State. From the testimony you have already received, you are, of course, aware of the fact that this is a nationwide problem, which, unfortunately, affects those who are most vulnerable—the aged, blind and disabled.

The Social Security Administration was kind enough to provide me with the New York State figures on Social Security's Title II Disability Insurance processing time. Please keep in mind that these figures represent the *average* processing time, not the extremes, and that we are talking about claims filed by individuals suffering from disabilities; in the majority of cases (close to 61% in NYS last year), allowances are granted, which is an indication that the claims are indeed real and that the individuals involved are in fact in need. In June of 1975 (the most recent statistics available), the *average* processing time for an initial claim for disability benefits was 14 days in the district office, 29 days in the State Agency and 17 days in the Central Office in Baltimore—a total of two months, on the average, to get a determination on an initial claim. Suppose, however, that the initial claim was disallowed and the claimant appealed. On the Reconsideration Level (the next step), it would take an individual in New York, on the average, an additional 2 to 4 months to obtain a decision. If his appeal were to go on to the third level, the Hearing Level, he would have to wait another 4 to 8 months to have his case heard. SSA's own figures show that the *average* claimant in my State could wait over a year to find out if he would be able to obtain disability insurance benefits. I have also seen the extreme cases where an individual has had to wait as much as 3 years for a final determination.

Witnesses before this Subcommittee have testified to the fact that the condition of a claimant tends to worsen over time so that by the time a claimant actually appears before an Administration Law Judge (on the average, one year after initial determination), there is greater likelihood for reversal. In addition, the claimant has suffered over an entire year without any greater degree of financial security, and his case has added to the backlog in the appeals process. I believe that serious consideration should be given to more in-depth initial consideration in an effort to alleviate this problem.

Mr. Chairman, I would like to stress my feeling that the delays suffered by Social Security claimants are not the fault of Social Security people in the field or the people in the regional offices. In the ten years that I have dealt with the SSA regional office in New York and the Central Office in Baltimore, I have received a great deal of cooperation, and I am convinced that the people in these offices are concerned about the delays and backlog in cases as we are. The fact is that they, and their counterparts in other State regional offices, are grossly understaffed, and the fault rests with policy makers here in Washington.

Let us take a look at the two major cases in point. When Black Lung cases were granted entitlement to apply for SSA disability insurance, there was a tremendous backlog in regular SSA disability claims. Rather than hiring additional personnel, in particular, Administrative Law Judges, SSA people were pulled from various states and sent into coal mining states in order to handle the deluge of cases. This was an administrative decision which clearly compounded the problem of delays and logjams.

Next came Supplementary Security Income in 1974, and SSA was again deluged. Rather than take on permanent additional personnel, temporary personnel were recruited, and this method was insufficient to handle the caseload. Additional backlogs occurred.

I would suspect that a great deal of the pressure to "underhire" came from the Administration here in Washington. In any case, Congress, I think, has evidenced its commitment to insure that SSA has the funding it needs to handle its caseload, to insure that Americans in need of assistance are getting it. Our concern now is how quickly they are getting it, and I hope that this Subcommittee working with SSA, will move to develop the reforms necessary for prompt action on behalf of this Nation's aged, blind and disabled citizens.

Again, Mr. Chairman, I thank you for holding these important hearings and for the opportunity to submit testimony for the record.

FLINT, MICH., *September 30, 1975.*

Hon. JAMES A. BURKE,
House of Representatives, Longworth House Office Building, Washington, D.C.

SIR: We would respectfully request that the following statement be included in the record in your forthcoming Subcommittee Hearings on Social Security:

PROBLEMS OF COMMUNICATION WITH THE APPEALS COUNCIL AND TIME LIMITS SET BY THE APPEALS COUNCIL

1. A principal problem for claimants in pursuing their claims through the Appeals Council is their inability to communicate with the Appeals Council. Once a case is beyond the Administrative Law Judge stage no one in the entire Administration seems to know where a file is or what action is being taken on a particular file during any month or week, much less on any given day.

2. Under the Social Security Regulations as they are enforced, the claimant or the claimant's representative is given ten days to respond to a letter from the Appeals Council. The time period commences to run from the date of the letter. Frequently the letter is not received by the claimant or the claimant's representative until after the expiration of the ten days. By the time the claimant responds to the Appeals Council by way of comments or additional evidence, the Appeals Council has already acted upon the matter. If the claimant attempts to contact the Appeals Council to request an extension of time during the ten day period, the claimant or the claimant's representative is met with a maze of red tape merely because no one in Washington seems to know where the file is. To overcome this problem we have tried regular mail, certified mail, certified mail de-

livered to addressee only, direct telephone calls, person-to-person telephone calls, and telegrams to Appeals Council members. All of these attempts have failed.

There would appear to be no substantial justification for only allowing ten days for the claimant to comment or submit additional evidence since there usually is a delay of three to six months before the Appeals Council sends out one of its form letters advising the claimant that the claimant has ten days within which to act.

POSSIBLE SOLUTIONS

1. The requirement that claimants or claimant's representatives respond within ten days must b[illegible] completely eliminated and the claimant should be given at least thirty days [illegible] probably forty-five days within which to respond by way of comments or additional evidence. Thirty days would probably be sufficient if the second solution set forth below is met. Otherwise, forty-five days would seem to be rea[illegible]

2. S[illegible] of accountability for the whereabouts of a file should be established [illegible]aim has reached the Appeals Council. We can think of two possible so[illegible]rst, one might try a central control office with certain persons assigned [illegible]andle files on an alphabetical basis. This would enable a claimant or claimant's representative to call a number in Washington and be transferred to the proper person in the control office who then would have a master list advising to whom the file has been assigned for handling along with that person's extension number. This does seem somewhat cumbersome, but at least it would be one way in which claimants or their representatives could discover the whereabouts of a file. (Claimants do not need to know where a file is so they can get a status report on it, they need to know where a file is so that if extensions are needed they can be granted.)

A second solution would be to have the acknowledgment of the request for review letter, which is presently sent to the claimant, also contain the name, address, and telephone number of the Appeals Council member to which the file has been assigned or the name, address, and telephone number of his assistant that is in charge of that particular file. This way all future communications by mail or telephone could be made directly to the Council member, his secretary, or the assigned assistant.

Only if claimants are permitted to present their entire positions as to why they feel they are entitled to Social Security Benefits can the public ever come to believe that the Appeals Council is any more than a rubber stamping board of approval for the Social Security Administration's prior determinations.

Respectfully submitted.

MACDONALD, FITZGERALD & MACDONALD,
R. DUNCAN MACDONALD.

NATIONAL SENIOR CITIZENS LAW CENTER,
Los Angeles, Calif., October 2, 1975.

Re Delays in the social security appeals process.

Hon. JAMES A. BURKE,
Chairman, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN BURKE: The National Senior Citizens Law Center is part of the federally funded Legal Services program for the poor. Since its establishment late in 1972, the Center has sought to expand the availability of high quality legal representation to the nation's elderly poor by providing supportive assistance to the Legal Services attorneys around the country on matters involving their elderly clients. A considerable portion of this assistance has been provided in connection with the problems currently under consideration by the Social Security Subcommittee—delays in the Social Security appeals process and assurance of *Goldberg* v. *Kelly* notice and hearing rights to recipients of Social Security benefits. Legal Services attorneys from every state regularly communicate with us about the difficulties with the Social Security Administration experienced by their clients. These difficulties, for both aged and disabled claimants, have centered far more on the issues of prompt and fair treatment that are the subject of the Subcommittee's inquiry than on substantive questions of eligibility or program structure. Our three years experience as an organization exclusively committed to redressing the legal problems of the elderly poor indicate, in short, that delays in the application and appeals process and the absence of assured prior notice and hearing rights in situations where benefits are at risk are the two most pervasive and wrenching Social Security problems faced by our constituency.

We assume from the subcommittee's decision to hold public hearings on these two problems that it shares our sense of urgency about finding solutions to them. That an aged or disabled person claiming Social Security benefits should not have to wait an inordinately long period of time before receiving a response to his application or to his request for a hearing before an administrative law judge is hardly a controversial proposition; nor is there likely to be much persuasive argument offered in opposition to a public policy which assures Social Security recipients the same notice and hearing rights enjoyed by recipients of assistance under such categorical programs as Aid to Families of Dependent Children and Supplemental Security Income. The questions facing the Subcommittee go less to what public policy should be respecting delays and prior hearings than to how policies already endorsed in principle by the Congress, the Executive Branch and the recipient community can be made effective in practice. The following approaches to these questions are offered to the Subcommittee in the wake of the efforts of Legal Services attorneys, which have met with only a mixed degree of success, to find solutions to the problems of administrative delay and less than full procedural due process through litigation. These approaches are only a beginning and will, we hope, be fleshed out by the expert advice and consultation the Subcommittee has sought out. But they do, we believe, suggest that the responsibility for guaranteeing prompt and fair treatment of recipients by the Social Security Administration may inevitably lay more with the Congress than with the courts.

THE NEED FOR CONGRESSIONALLY ASSURED ACCESS TO JUDICIAL REVIEW

Legal Services attorneys whose clients' rights are hamstrung by protracted delays in the Social Security appeals process quickly learn that they can get relief for a particular claimant simply by filing a lawsuit. The suit will never be heard on the merits by a judge, but the mere act of filing it will normally prompt the Social Security Administration, which like most institutions often acts in accordance with the squeaky wheel principle, to resolve the immediate problem of the person in whose name the suit is filed by immediately issuing an Initial Determination, setting a date for a hearing, or putting a check in the mail for the amount concededly owed the claimant. The problem with this approach is that it solves one person's problems while leaving the more systemic roots of delay untouched. To attempt to reach these roots through litigation and thereby to bring about reasonably prompt disposition of the claims of all Social Security applicants and recipients requires that any suit which is filed be brought as a class action, for it is only by representing a class of claimants that a Legal Services attorney can avoid the mooting of his arguments by the granting of relief to his immediate client which quickly follows upon the filing of the suit. The Supreme Court, however, in a case decided at the very end of its last term, has erected some high and perhaps insurmountable barriers against class action litigation designed to vindicate the procedural rights of the Social Security claimants. The case, *Weinberger* v. *Salfi*, 43 U.S. Law Week 4985 (July 26, 1975), a copy of which is attached for the Subcommittee's convenience, upheld the constitutionality of the provision in the Social Security Act requiring that a woman have been married to a deceased worker for at least nine months prior to his death in order to claim benefits as his widow. But in addition to its holding against the merit of the constitutional attack on this provision, the Court also indicated that the only route to judicial review of *any* decision of the Social Security Administration affecting a claimant's rights is through the administrative appeals process provided by the Congress at Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). In light of this decision by the Court, it appears that, unless the Congress indicates a contrary design, all other traditional sources of authortiy for judicial review of actions of the Social Security Administration are foreclosed. This means, for example, that a claimant who seeks to compel the Commissioner of Social Security to perform a duty owed him, such as prompt disposal of his claim for benefits, or the accordance of a prior hearing before suspending or terminating his benefits, may not be able to call on the mandamus statute, 28 U.S.C. § 1361, as a basis for bringing his claim before a federal district judge. Rather, he may be compelled to exhaust the very administrative procedure that is the source of his grievance in order to reach a court with his claim, thereby guaranteeing that any relief the court may ultimately grant will come too late to solve the problem which prompted him to seek judicial review in the first place. Similarly, the *Salfi* decision appears to deny Social Security claimants access to the protection of the Administrative Procedure Act which generally guarantees citizens judicial review of agency actions which affect their rights and are not subject to further agency review and which protects citizens against inordinate agency delays. *See* 5 U.S.C. §§ 701–706. If a claimant can only present his allegations of undue delay to a court after completing the appeals process authorized by Section 205(g), the delays he complains of will already have run their course and will have rendered hollow any judicial decision that he was indeed protected from such delays by the Administrative Procedure Act.

The Supreme Court further intimated in its decision in the *Salfi* case that judicial review of a Social Security claim is necessarily limited to authority to "affirm, modify or reverse" the decision of the Social Security Administration with respect only to the allegations of the "particular applicants before the Court." 43 U.S. Law Week 4989 at n. 8. On this view, federal courts may be foreclosed entirely from granting relief to a class of Social Security recipients. If this is so, there is literally no possible way to place claims of undue administrative delay before a court since the grievance of any particular applicant will have been "mooted" by the government long before it can be resolved on its merits.

If the foregoing results are to be averted and the federal courts to play any role at all in redressing problems of administrative delay and rights to notice and hearing, Congress must promptly amend the language in the Social Security Act which served as the basis for the jurisdiction and class action portions of the Supreme Court's decision in *Salfi*. Thus, Sections 205(g) and 205(h) of the Act, 42 U.S.C. §§ 405 (g) and (h), must be amended to make clear that the agency's administrative appeals process need only be exhausted when the question raised by a claimant goes to his eligibility for benefits or the amount of benefits to which he is entitled, and not when his claim concerns delay, absence of prior notice and hearing, or some other defect in the appeals process itself. Sections 405 (g) and (h) should also be amended to make clear that federal mandamus jurisdiction and the Administrative Procedure Act are available to a claimant aggrieved by such procedural defects as sources of judicial review over his claims Finally, Congress must make clear that the authority of a federal district judge to affirm, reverse or modify the decision of the Administration with respect to a claim for benefits does not foreclose the issuance of relief on behalf of a class of recipients who are similarly situated.

THE NEED FOR CONGRESSIONAL STANDARDS

A suit on behalf of a class of Social Security claimants who have suffered inordinately long delays at the hands of the Social Security appeals process, which manages to hurdle the barriers to relief erected by the *Salfi* decision, is likely, no matter how telling the experiences of the claimants in favor of the need for some sort of redress, to encounter extreme judicial reluctance to grant the relief sought. The reason for this is that any solution to systemic, protracted delays in issuing Initial Determinations, setting dates for administrative hearings, or issuing the results of those hearings inevitably includes the establishment of particular time limits within which the Administration must complete any or all of these steps. A court order that the Administration must act within "reasonable" time limits is likely, without more, to be useless since the claimants and the Administration will have powerful disagreements over what is reasonable and since enforcement of so vague an order will place the court which issued it in the role of watchdog over the agency's practices for an indefinite period of time, a role any court is understandably most reluctant to assume. At the same time, while realizing that meaningful relief must necessarily embrace particular time limits, most courts will be equally hesitant to establish such particular limits themselves. This hesitancy also stems from the uneasiness felt by almost any judge about substituting his own judgment for that of the Social Security Administration with respect to matters he may feel are largely within the Administration's competence and not subject to resolution through the extremely general and essentially neutral principles of law at his disposal. As evidence of this judicial diffidence, we can point out to the Subcommittee that of the half dozen or so cases seeking the imposition of time limits on the Social Security Administration which have avoided dismissal, none has to date yielded the establishment of the limits sought by the plaintiffs.

This record shows, we believe, that an effective solution to the problems of delay in the Social Security appeals process, both at the application and hearing stages, is likely to be found only in the imposition of particular time limits by the Congress. The Social Securtiy Act should be amended to require that all applications for Social Security benefits yield an Initial Determination within a certain period of days. Similarly, all requests for hearing must be required to be docketed within a certain number of days. And finally, the outcome of every hearing must be required to be communicated to the claimant, again within a certain number of days. The particular limits imposed by these amendments are less important than is the principle that there are such limits and that claimants may count on their observance by the Administration. As reference points for particular limits, however, we would point to the periods of 30 days for the aged and 60 days for the disabled within which applications were required to be acted upon by the states in the categorical welfare programs which preceded the enactment of the Supplemental Security Income program; with respect to hearings, we would point toward the approach offered by Senator Taft in S. 1514 which, in the context of the SSI program, would require that benefits be paid to any disability claimant who has requested a hearing and who has not received a determination on the basis of such hearing with 120 days of his request. For aged claimants, the time period ought be appropriately reduced, perhaps to 90 days. The provision in S. 1514 for payment in the event the time limits are not met by the Administration is crucial.

The single time limit imposed on the Social Security Administration at present. the provision requiring that hearing determinations respecting claims by aged SSI recipients be provided within 90 days of the hearing request, has, in our experience, been largely ignored. According to a hearing examiner who serves in the New England region, the reason for the Administration's failure to observe this statutory limit is precisely the limit's failure to mandate payment of benefits to recipients whenever it is breached.

We appreciate this opportunity to offer the perspectives of the nation's Legal Services attorneys on the problems of delay and due process in Social Security applications and appeals. We very much appreciate the Subcommittee's close scrutiny of these problems and wish it well in its work.

Sincerely,

BRUCE K. MILLER,
Staff Attorney.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.,* 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* SALFI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 74–214. Argued March 19, 1975—Decided June 26, 1975

After her husband of less than six months died, appellee widow filed applications for mother's social security insurance benefits for herself and child's insurance benefits for her daughter by a previous marriage, but the Social Security Administration (SSA), both initially and on reconsideration at the regional level, denied the applications on the basis of the duration-of-relationship requirements of the Social Security Act (Act), 42 U. S. C. §§ 416 (c)(5) and (e)(2), which define "widow" and "child" so as to exclude surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death. Appellees widow and child, seeking declaratory and injunctive relief, then brought a class action in Federal District Court on behalf of all widows and stepchildren denied benefits because of the nine-month requirements. A three-judge court, after concluding that it had federal-question jurisdiction under 28 U. S. C. § 1331, held that the nine-month requirements constituted constitutionally invalid "irrebutable presumptions," and accordingly enjoined appellant Department of Health, Education, and Welfare (HEW), its Secretary, and the SSA and various of its officials from denying benefits on the basis of those requirements. *Held:*

1. The District Court did not have federal-question jurisdiction under 28 U. S. C. § 1331, because such jurisdiction is barred by the third sentence of 42 U. S. C. § 404 (h), which provides that no action against the United States, the HEW Secretary, or any officer or employee thereof shall be brought under, *inter alia,* 28 U. S. C. § 1331 to recover on any claim arising under Title II of

the Act, which covers old-age, survivors', and disability insurance benefits. Pp. 4–10.

(a) That § 405 (h)'s third sentence, contrary to the District Court's view, does not merely codify the doctrine of exhaustion of remedies, is plain from its sweeping language; and, moreover, to construe it so narrowly would render it superfluous in view of § 405 (h)'s first two sentences, which provide that the Secretary's findings and decision after a hearing shall be binding upon all parties to the hearing and shall not be reviewed except as provided in § 405 (g), which, *inter alia,* requires administrative exhaustion. Pp. 4–7.

(b) There is no merit to appellees' argument that because their action arises under the Constitution and not under the Act, it is not barred by § 405 (h), since, although their claim does arise under the Constitution, it also arises under the Act, which furnishes both the standing and substantive basis for the constitutional claim. Pp. 7–8.

(c) Section 405 (h)'s third sentence extends to any "action" seeking "to recover on any [social security] claim"—irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory retrictions—and, although not precluding constitutional challenges, simply requires that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards that apply to nonconstitutional claims arising under the Act. *Johnson* v. *Robison*, 415 U. S. 361, distinguished. Pp. 8–10.

2. The District Court had no jurisdiction over the unnamed members of the class under 42 U. S. C. § 405 (g), which provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action," since the complaint as to such class members is deficient in that it contains no allegations that they have even filed an application for benefits with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. Pp. 10–11.

3. The District Court had jurisdiction over the named appellees under § 405 (g). While the allegations of the complaint with regard to exhaustion of remedies fall short of meeting § 405 (g)'s literal requirement that there shall have been a "final decision of the Secretary after a hearing" and of satisfying the Secretary's

regulations specifying that the finality required for judicial review be achieved only after the further steps of a hearing before an administrative judge and possibly consideration by the Appeals Council, nevertheless the Secretary by not challenging the sufficiency of such allegations has apparently determined that for purposes of this action the reconsideration determination is "final." Under the Act's administrative scheme, the Secretary may make such a determination, because the term "final decision" is left undefined by the Act and its meaning is to be fleshed out by the Secretary's regulations, 42 U. S. C. § 405 (a), and because no judicial or administrative interest would be served by further administrative proceedings once the Secretary concluded that a matter is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Similar considerations control with regard to the requirement that the Secretary's decision be made "after a hearing," since under such circumstances a hearing would be futile and wasteful and since, moreover, the Secretary may award benefits without requiring a hearing. Pp. 11–14.

4. The nine-month duration-of-relationship requirements of §§ 416 (c)(5) and (e)(2) are not unconstitutional. Pp. 14–32.

(a) A statutory classification in the area of social welfare such as the Social Security program is constitutional if it is rationally based and free from invidious discrimination. Pp. 15–17.

(b) A noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, although of course there may not be invidious discrimination among such claimants. *Stanley* v. *Illinois,* 405 U. S. 645; *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632, distinguished. The benefits here are available upon compliance with an objective criterion, one that the Legislature considered to bear a sufficiently close nexus with underlying policy objectives as to be used as the test for eligibility. Appellees are free to present evidence that they meet the specified requirements, failing which, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test, *Vlandis* v. *Kline,* 412 U. S. 441, distinguished. Pp. 17–20.

(c) The duration-of-relationship test meets the constitutional standard that Congress, its concern having been reasonably aroused by the possibility of an abuse—the use of sham marriages to secure social security benefits—which it legitimately desired to avoid, could rationally have concluded that a particular limitation or qualification would protect against its occurrence, that the expense and other difficulties of individual determinations justified the inherent imprecision of an objective, easily-administered prophylactic rule. Pp. 20–27.

(d) Neither the fact that § 416 (c)(5) excludes some wives who married with no anticipation of shortly becoming widows nor the fact that the requirement does not filter out every such claimant, if a wage earner lives longer than anticipated or has an illness that can be recognized as terminal more than nine months prior to death, necessarily renders the statutory scheme unconstitutional. While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule that may not exclude some obviously sham arrangements, Congress could rationally choose to adopt such a course. Pp. 27–30.

373 F. Supp. 961, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 74-214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants,
v.
Concetta Salfi et al.

On Appeal from the United States District Court for the Northern District of California.

[June 26, 1975]

Mr. Justice Rehnquist delivered the opinion of the Court.

Appellants, the Department of Health, Education, and Welfare, its Secretary, the Social Security Administration and various of its officials, appeal from a decision of the United States District Court for the Northern District of California invalidating duration-of-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners. 373 F. Supp. 961 (1974).

That court concluded that it had jurisdiction of the action by virtue of 28 U. S. C. § 1331, and eventually certified the case as a class action. On the merits, it concluded that the nine-months requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) constituted "irrebuttable presumptions" which were constitutionally invalid under the authority of *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974), *Vlandis* v. *Kline,* 412 U. S. 441 (1973), and *Stanley* v. *Illinois,* 405 U. S. 645 (1972). We hold that the District Court did not have jurisdiction of this action under 28 U. S. C. § 1331, and that while it had jurisdiction of the claims of the named appellees under the provisions of 42 U. S. C. § 405 (g), it had no jurisdiction over the claims asserted on behalf of unnamed class members. We further decide that the District Court was wrong on the merits of the constitutional question tendered by the named appellees.

I

Appellee Salfi married the deceased wage earner, Londo L. Salfi, on May 27, 1972. Despite his alleged apparent good health at the time of the marriage, he suffered a heart attack less than a month later, and died on November 21, 1972, less than six months after the marriage. Appellee filed applications for mother's insurance benefits for herself and child's insurance benefits for her daughter by a previous marriage, Doreen Kalnins.[1] These applications were denied by the Social Security Administration, both initially and on reconsideration at the regional level, solely on the basis of the duration-of-relationship requirements of §§ 416 (c)(5) and (e)(2), which define "widow" and "child." The definitions exclude surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death.[2]

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[1] Title 42 U. S. C. § 402 (g)(1) provides for benefits for the "widow" of an insured wage earner, regardless of her age, if she has in her care a "child" of such wage earner who is entitled to child's insurance benefits. Title 42 U. S. C. § 402 (d) provides for benefits for the "child" of a deceased insured wage earner who was dependent upon him at his death.

[2] Title 42 U. S, C. § 416 (c) provides in full:

"(c) The term 'widow' (except when used in section 402 (i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child

The named appellees then filed this action, principally relying on 28 U. S. C. § 1331 for jurisdiction. They sought to represent the class of "all widows and stepchildren of deceased wage earners who are denied widow's [*sic*] and children's insurance benefits because the wage earner died within nine months of his marriage to the applicant or (in case of a stepchild) the applicant's mother." App., at 8. They alleged at least partial exhaustion of remedies with regard to their personal claims, but made no similar allegations with regard to other class members. They sought declaratory relief against the challenged statute, and injunctive relief restraining appellants from denying mother's and child's benefits on the basis of the statute. In addition to attorneys'

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under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402 (s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 228e of Title 45."

It is undisputed that appellee Salfi cannot qualify as a "widow" by satisfying conditions (1), (2), (3), (4), or (6).

Title 42 U. S. C. (Supp. II) § 416 (e) provides in part:

"(e) The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died . . . ."

Prior to 1967, the required duration of relationship was a full year. The reduction to nine months was accomplished in Pub. L. 90-248, §§ 156 (a) and (b), 81 Stat. 832, 866.

fees and costs, they also sought "damages or sums due and owing equivalent to the amount of benefits to which plaintiffs became entitled as of the date of said entitlement." *Id.*, at 13.

A three-judge District Court heard the case on cross-motions for summary judgment, and granted substantially all of the relief prayed for by appellees. The District Court rendered a declaratory judgment holding the challenged statute to be unconstitutional, certified a class consisting of "all otherwise eligible surviving spouses and stepchildren . . . heretofore disqualified from receipt of . . . benefits by operation" of the duration-of-relationship requirements, enjoined appellants from denying benefits on the basis of those requirements, and ordered them to provide such benefits "from the time of original entitlement." 373 F. Supp., at 966. We noted probable jurisdiction of the Secretary's appeal from that judgment. 419 U. S. 992 (1974).

In addition to their basic contention that the duration-of-relationship requirements meet constitutional muster, appellants present several contentions bearing on the scope of the monetary relief awarded by the District Court. They contend that the award is barred by sovereign immunity insofar as it consists of retroactive benefits, that regardless of sovereign immunity invalidation of the duration-of-relationship requirements should be given prospective effect only, and that the District Court did not properly handle certain class action issues. Because we conclude that the duration-of-relationship requirements are constitutional, we have no occasion to reach the retroactivity and class action issues. We are confronted, however, by a serious question as to whether the District Court had jurisdiction over this suit.

II

The third sentence of 42 U. S. C. § 405 (h) provides:

"No action against the United States, the Secretary,

> or any officer or employee thereof shall be brought under [§§ 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." [3]

On its face, this provision bars district court federal question jurisdiction over suits, such as this one, which seek to recover Social Security benefits. Yet it was § 1331 jurisdiction which appellees successfully invoked in the District Court. That court considered this provision, but concluded that it was inapplicable because it amounted to no more than a codification of the doctrine of exhaustion of administrative remedies. The District Court's reading of § 405 (h) was, we think, entirely too narrow.

That the third sentence of § 405 (h) is more than a codified requirement of administrative exhaustion is plain from its own language, which is sweeping and direct and which states that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted. Moreover, if the third sentence is construed to be nothing more than a requirement of administrative exhaustion, it would be superflous. This is because the first two sentences of § 405 (h), which appear in the margin,[4] assure that administrative exhaustion will be

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[3] The literal wording of this section bars actions under § 41 of Title 28. At the time § 405 (h) was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of that title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes.

[4] "Title 42 U. S. C. 405 (h) provides in full:

"*Finality of Secretary's decision.*

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by required. Specifically, they prevent review of decisions of the Secretary save as provided in the Act, which provision is made in § 405 (g).[5] The latter section pre-

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any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[5] "Title 42 U. S. C. 405 (g) provides:

"*Judicial review.*

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional scribes typical requirements for review of matters before an administrative agency, including administrative exhaustion.[6] Thus the District Court's treatment of the

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and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

[6] Nor can it be argued that the third sentence of § 405 (h) simply serves to prevent a by-pass of the § 405 (g) requirements by filing a district court complaint alleging entitlement prior to applying for benefits through administrative channels. The entitlement sections of the Act specify the filing of an application as a prerequisite to entitlement, so a court could not in any event award benefits absent an application. See §§ 402 (a)–(h). See also § 402 (j)(1). Once the application is filed, it is either approved, in which event any suit for benefits would be mooted, or it is denied. Even if the denial is nonfinal, it is still a "decision of the Secretary" which, by virtue of the second sentence of § 405 (h), may not be reviewed save pursuant to § 405 (g).

Our Brother BRENNAN relies heavily, *post,* at 5–7, on a passage from a Senate document entitled "Monograph of the Attorney General's Committee on Administrative Procedure." Sen. Doc. 10, 77th Cong., 1st Sess., 39 (1941). The basic monograph itself is described as "embodying the results of the investigation made by the staff of said Committee relative to the administrative practices and procedures, of several agencies of the government." Following the text of the monograph is the "Appendix," which in turn is described in a "Foreword" as follows: "This statement, developed from a report by the Bureau of Old-Age and Survivors Insurance making certain recommendations for the Board's consideration, describes the essential features of a hearing and review system which has been authorized by the Board and which is designed to meet both the statutory requirements and the social purposes of the old-age and survivors insurance program. It has been developed during several months under the leadership of Ralph F. Fuchs, third sentence of § 405 (h) ignored not only that sentence's plain language, but also relegated it to a function which is already performed by other statutory provisions.

A somewhat more substantial argument that the third sentence of § 405 (h) does not deprive the District Court of federal question jurisdiction relies on the fact that it only affects actions to recover on "any claim arising under [Title II]" of the Social Security Act.[7] The argument is that the present action arises under the Constitu-

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professor of law, Washington University, St. Louis, Mo., a consultant of this Bureau, by whom the Bureau's report, in the main, was written." *Id.*, at 34. After the "Foreword" follows a three-part report in somewhat smaller type, the second of which parts is entitled "Considerations Affecting the Hearing and Review System." Within this second part, appears the language which the dissenters characterize as "the reading which the Social Security Board itself gave to the provision soon after it went into effect." *Post,* at 5.

We have some doubts that the report of a consultant can be properly characterized as incorporating the "reading which the Social Security Board itself gave" to this provision. Even if the report as a whole is stated to have been "approved" by the Board, there is no indication that such approval extends beyond the report's broad-brush conceptualization of "the essential features of a hearing and review system." In any event, we do not agree that an administrative agency's general discussion of a statute, occurring after its passage, and in a context which does not require it to focus closely on the operative impact of a particular provision, is either an important indicator of congressional intent, as the dissent suggests, *post,* at 7, or an authoritative source for the proposition that a provision serves a particular function. Finally, even if the report is an accurate reading of the Act, its significance goes only to whether the third sentence of § 405 (h) serves a function *in addition to* that which we believe it serves; the possibility that the District Court's interpretation renders the third sentence only largely superfluous rather than totally so is not sufficient to disturb our analysis of the role of that sentence in this case.

[7] Title II contains the old-age, survivors and disability insurance programs codified at 42 U. S. C. § 401 *et seq.*

tion and not under Title II. It would of course be fruitless to contend that appellees' claim is one which does not arise under the Constitution, since their constitutional arguments are critical to their complaint. But it is just as fruitless to argue that this action does not also arise under the Social Security Act. For not only is it Social Security benefits which appellees seek to recover, but it is the Social Security Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions. Appellees sought, and the District Court granted, a judgment directing the Secretary to pay Social Security benefits. To contend that such an action does not arise under the act whose benefits are sought is to ignore both the language and the substance of the complaint and judgment. This being so, the third sentence of § 405 (h) precludes resort to federal question jurisdiction for the adjudication of appellees' constitutional contentions.

It has also been argued that *Johnson* v. *Robison,* 415 U. S. 361 (1974), supports the proposition that appellees are not seeking to recover on a claim arising under Title II. In that case we considered 38 U. S. C. § 211 (a), which provides:

> "[T]he decisions of the [Veterans'] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

We were required to resolve whether this language precluded an attack on the constitutionality of a statutory limitation. We concluded that it did not, basically because such a limitation was not a "decision" of the Administrator "on any question of law or fact"; indeed, the "decision" had been made by Congress, not the Administrator, and the issue was one which the Administrator considered to be beyond his jurisdiction. 415 U. S., at 367–368. Thus the question sought to be litigated was simply not within § 211 (a)'s express language, and there was accordingly no basis for concluding that Congress sought to preclude review of the constitutionality of veterans' legislation.

The language of § 405 (h) is quite different. Its reach is not limited to decisions of the Secretary on issues of law or fact. Rather, it extends to any "action" seeking "to recover on any [Social Security] claim"—irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions.

There is another reason why *Johnson* v. *Robison* is inapposite. It was expressly based at least in part on the fact that if § 221 (a) reached constitutional challenges to statutory limitations, then absolutely no judicial consideration of the issue would be available. Not only would such a restriction have been extraordinary, such that "clear and convincing evidence" would be required before we would ascribe such intent to Congress, *id.,* at 373, but it would have raised a serious constitutional question of the validity of the statute as so construed. *Id.,* at 366–367. In the present case, as will be discussed below, the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. Thus the plain words of the third sentence of § 405 (h) do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act. The result is not only of unquestionable constitutionality, but it is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act.

As has been stated, the Social Security Act itself provides for district court review of the Secretary's determinations. Title 42 U. S. C. § 405 (g) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within 60 days after the mailing to him of notice of such decision . . . ." See n. 5, *supra.* The question with which we must now deal is whether this provision could serve as a jurisdictional basis for the District Court's consideration of the present case. We conclude that it provided jurisdiction only as to the named appellees and not as to the unnamed members of the class.[8]

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[8] Since § 405 (h) is the basis for district court jurisdiction, there is some question as to whether it had authority to enjoin the operation of the duration-of-relationship requirements. Section 405 (h) accords authority to affirm, modify or reverse a decision of the Secretary. It contains no suggestion that a reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicants before the court. In view of our dispositions of the class action and constitutional issues in this case, the only significance of this problem goes to our own jurisdiction. If a § 405 (g) court is not empowered to enjoin the operation of a federal statute, then a three-judge District Court was not required to hear this case, 28 U. S. C. § 2282, and we are without jurisdiction under 28 U. S. C. § 1253. However, whether or not the three-judge court was properly convened, that court did hold a federal statute unconstitutional in a civil action to which a federal agency and officers are parties. We thus have direct appellate jurisdiction under 28 U. S. C. § 1252. *McLucas* v. *DeChamplain,* slip op., at 8–9 (No. 73–1346, Apr. 15, 1975).

Section 405 (g) specifies the following requirements for judicial review: (1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary may allow); and (3) filing of the action in an appropriate district court, in general that of the plaintiff's residence or principal place of business. The second and third of these requirements specify, respectively, a statute of limitations and appropriate venue. As such, they are waivable by the parties, and not having been timely raised below, see Fed. Rules Civ. Proc. 8 (c), 12 (h)(1), need not be considered here. We interpret the first requirement, however, to be central to the requisite grant of subject matter jurisdiction—the statute empowers district courts to review a particular type of decision by the Secretary, that type being those which are "final" and "made after a hearing."

In the present case, the complaint seeks review of the denial of benefits based on the plain wording of a statute which is alleged to be unconstitutional. That a denial on such grounds, which are beyond the power of the Secretary to affect, is nonetheless a decision of the Secretary for these purposes has been heretofore established. *Flemming* v. *Nestor*, 363 U. S. 603 (1960). As to class members, however, the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. The class thus cannot satisfy the requirements for jurisdiction under 42 U. S. C. § 405 (g). Other sources of jurisdiction being foreclosed by § 405 (h), the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal.

The jurisdictional issue with respect to the named appellees is somewhat more difficult. In a paragraph entitled "Exhaustion of Remedies," the complaint alleges that they fully presented their claims for benefits "to their district Social Security Office and, upon denial, to the Regional Office for reconsideration." It further alleges that they have no dispute with the Regional Office's findings of fact or applications of statutory law, and that the only issue is a matter of constitutional law which is beyond the Secretary's competence. On their face these allegations with regard to exhaustion fall short of meeting the literal requirement of § 405 (g) that there have been a "final decision of the Secretary made after a hearing." They also fall short of satisfying the Secretary's regulations, which specify that the finality required for judicial review is achieved only after the further steps of a hearing before an administrative law judge and, possibly, consideration by the Appeals Council. See 20 CFR §§ 404.916, 404.940, 404.951 (1974).

We have previously recognized that the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue. *Parisi* v. *Davidson,* 405 U. S. 34 (1972); *McKart* v. *United States,* 395 U. S. 185 (1969). Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. See, *e. g., McKart* v. *United States, id.,* at 193–194. Plainly these purposes have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once a benefit applicant has presented his or her claim at sufficiently high a level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest.

The present case, of course, is significantly different from *McKart* in that a "final decision" is a statutorily specified jurisdictional prerequisite. The requirement is, therefore, as we have previously noted, something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility such as that made by the District Court here. But it is equally true that the requirement of a "final decision" contained in § 405 (g) is not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332. The term "final decision" is not only left undefined by the Act, but its meaning is left to the Secretary to flesh out by regulation.[9] Section 405 (*l*) of the Act accords the Secretary complete authority to delegate his statutory duties to officers and employees of the Department of Health, Education, and Welfare. The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration. While a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary, we believe it would be inconsistent with the congressional scheme to bar the Secretary from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be "final" within the language of § 405 (g).

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[9] Title 42 U. S. C. § 405 (a):

"(a) The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

Much the same may be said about the statutory requirement that the Secretary's decision be made "after a hearing." Not only would a hearing be futile and wasteful, once the Secretary has determined that the only issue to be resolved is a matter of constitutional law concededly beyond his competence to decide, but the Secretary may, of course, award benefits without requiring a hearing. We do not understand the statute to prevent him from similarly determining in favor of the applicant, without a hearing, all issues with regard to eligibility save for one as to which he considers a hearing to be useless.

In the present case the Secretary does not raise any challenge to the sufficiency of the allegations of exhaustion in appellees' complaint. We interpret this to be a determination by him that for the purposes of this litigation the reconsideration determination is "final." The named appellees thus satisfy the requirements for § 405 (g) judicial review, and we proceed to the merits of their claim.[10]

III

The District Court relied on congressional history for the proposition that the duration-of-relationship requirement was intended to prevent the use of sham marriages to secure Social Security payments. As such concluded the court, "the requirement constitutes a presumption that marriages like Mrs. Salfi's, which did not precede the wage earner's death by at least nine months, were entered into for the purpose of securing Social Security benefits." 373 F. Supp., at 965. The presumption was moreover, conclusive, because applicants were not afforded an opportunity to disprove the presence of the illicit purpose. The court held that under our decisions in *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974), *Vlandis* v. *Kline,* 412 U. S. 441 (1973), and *Stanley* v. *Illinois,* 405 U. S. 645 (1972), the requirement was unconstitutional, because it presumed a fact which was not necessarily or universally true.

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[10] Section 405 (g) jurisdiction in *Weinberger* v. *Wiesenfeld,* 420 U. S. — (1975), was similarly present. In that case the Secretary stipulated that exhaustion would have been futile, and he did not make any contentions that Wiesenfeld had not complied with the requirements of § 405 (g). *Id.*, at n. 8.

Our ultimate conclusion is that the District Court was wrong in holding the duration-of-relationship requirement unconstitutional. Because we are aware that our various holdings in related cases do not all sound precisely the same note, we will explain ourselves at some length.

The standard for testing the validity of Congress' Social Security classification was clearly stated in *Flemming* v. *Nestor,* 363 U. S. 603, 611 (1960):

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

In *Richardson* v. *Belcher,* 404 U. S. 78 (1971), a portion of the Social Security Act which required an otherwise entitled disability claimant to be subjected to an "offset" by reason of his simultaneous receipt of state workmen's compensation benefits was attacked as being violative of the Due Process Clause of the Fifth Amendment. The claimant in that case asserted that the provision was arbitrary in that it required offsetting of a state workmen's compensation payment, but not of a similar payment made by a private disability insurer. The Court said:

> "If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment." *Id.*, at 84.

Two Terms earlier the Court had decided the case of *Dandridge* v. *Williams*, 397 U. S. 471 (1970), in which it rejected a claim that Maryland welfare legislation violated the Equal Protection Clause of the Fourteenth Amendment. The Court had said:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69–70. . . .
>
> "To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, in-

> volves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. . . . It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. *Goesaert* v. *Cleary,* 335 U. S. 464; *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552. See also *Flemming* v. *Nestor,* 363 U. S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.,* at 485–486.

The relation between the equal protection analysis of *Dandridge* and the Fifth Amendment due process analysis of *Flemming* v. *Nestor* and *Richardson* v. *Belcher* was described in the latter case in this language:

> "A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination.' *Dandridge* v. *Williams,* 397 U. S. 471, 487. While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497, 499."

These cases quite plainly lay down the governing principle for disposing of constitutional challenges to classifications in this type of social welfare legislation. The District Court, however, chose to rely on *Cleveland Board* *of Education* v. *LaFleur, supra; Vlandis* v. *Kline, supra,* and *Stanley* v. *Illinois, supra.* It characterized this recent group of cases as dealing with "the appropriateness of conclusive evidentiary presumptions." 373 F. Supp., at 965.

Stanley v. *Illinois* held that it was a denial of the equal protection guaranteed by the Fourteenth Amendment for a State to deny a hearing on parental fitness to an unwed father when such a hearing was granted to all other parents whose custody of their children was challenged. This Court referred to the fact that the "rights to conceive and to raise one's children have been deemed 'essential,' *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923), 'basic civil rights of man,' *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942), and 'rights far more precious . . . than property rights,' *May* v. *Anderson,* 345 U. S. 528, 533 (1953)." 405 U. S., at 651.

In *Vlandis* v. *Kline,* a statutory definition of "residents" for purposes of fixing tuition to be paid by students in a state university system was held invalid. The Court held that where Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue. 412 U. S., at 452.

In *LaFleur* the Court held invalid, on the authority of *Stanley* and *Vlandis,* school board regulations requiring pregnant school teachers to take unpaid maternity leave commencing five months before the expected birth. The Court stated its long-standing recognition "that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," 414 U. S., at 639–640, and that "overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." *Id.,* at 640.

We hold that these cases are not controlling on the issue before us now. Unlike the claims involved in *Stanley* and *LaFleur,* a noncontractural claim to receive funds from the public treasury enjoys no constitutionally protected status, *Dandridge* v. *Williams, supra,* though of course Congress may not invidiously discriminate among such claimants on the basis of a "bare congressional desire to harm a politically unpopular group," *U. S. Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 534 (1973), or on the basis of criteria which bear no rational relation to a legitimate legislative goal. *Jimenez* v. *Weinberger,* 417 U. S. 628, 636 (1974); *U. S. Dept. of Agriculture* v. *Murry,* 413 U. S. 508, 513–514 (1973). Unlike the statutory scheme in *Vlandis,* 412 U. S., at 449, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), aff'd, 401 U. S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintffs in *Starns,* appellants are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.

We think that the District Court's extension of the holdings of *Stanley, Vlandis* and *LaFleur* to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution. For example, the very section of Title 42 which authorizes an action such as this, § 405 (g), requires that a claim be filed within 60 days after administrative remedies are exhausted. It is indisputable that this requirement places people who file their claims more than 60 days after exhaustion in a different "class" than people who file their claims within the time limit. If we were to follow the District Court's analysis, we would first try to ascertain the congressional "purpose" behind the provision, and probably would conclude that it was to prevent stale claims from being asserted in court. We would then turn to the question of whether such a flat cutoff provision was necessary to protect the Secretary from stale claims, whether it would be possible to make individualized determinations as to any prejudice suffered by the Secretary as the result of an untimely filing, and whether or not an individualized hearing on that issue should be required in each case. This would represent a degree of judicial involvement in the legislative function which we have eschewed except in the most unusual circumstances, and which is quite unlike the judicial role mandated by *Dandridge, Belcher* and *Flemming* v. *Nestor,* as well as by a host of cases arising from legislative efforts to regulate private business enterprises.

In *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955), the Court dealt with a claim that the Equal Protection Clause of the Fourteenth Amendment was violated by an Oklahoma statute which subjected opticians to a system of detailed regulation, but which exempted sellers of ready-to-wear glasses. In sustaining the statute the Court said:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition.

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think." *Id.*, at 489.

More recently, in *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), the Court sustained the constitutionality of a regulation promulgated under the Truth in Lending Act which made the Act's disclosure provisions applicable whenever credit is offered to a consumer " 'for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments.' " *Id.*, at 362. The regulation was challenged because it was said to conclusively presume that payments made under an agreement providing for more than four installments necessarily included a finance charge, when in fact that might not be the case. The Court rejected the constitutional challenge in this language:

> "The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class." *Id.*, at 377.

If the Fifth and Fourteenth Amendments permit this latitude to legislative decisions regulating the private sector of the economy, they surely allow no less latitude in prescribing the conditions upon which funds shall be dispensed from the public treasury. *Dandridge* v. *Williams, supra.* With these principles in mind, we turn to consider the statutory provisions which the District Court held invalid.

Title 42 U. S. C. (Supp. III) § 40[illegible] basic congressional enactment defining eligib[illegible] old age survivors' insurance benefit payments, and is divided into

23 lettered subsections. Subsection 402 (g) is entitled "Mother's insurance benefits," and primarily governs the claim of appellee Salfi. Subsection 402 (d) governs eligibility for child's insurance benefits, and is the provision under which appellee Kalnins makes her claim. These subsections, along with others in § 402, specify the types of social risks for which protection is provided by what is basically a statutory insurance policy.

A different insurance system, but similarly defined by statute and operated by a governmental entity, was the subject of our consideration in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), and our disposition of that case is instructive. We reversed the judgment of a district court which had held that a California state disability insurance program was invalid insofar as it failed to provide benefits for disabilities associated with normal pregnancy. In our opinion we said:

> "The District Court suggested that moderate alterations in what it regarded as 'variables' of the disability insurance program could be made to accommodate the substantial expense required to include normal pregnancy within the program's protection. The same can be said, however, with respect to the other expensive class of disabilities that are excluded from coverage—short-term disabilities. If the Equal Protection Clause were thought to compel disability payments for normal pregnancy, it is hard to perceive why it would not also compel payments for short-term disabilities suffered by participating employees.
>
> "It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require a state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering

> insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has." *Id.*, at 495–496.

The present case is somewhat different, since the Secretary principally defends the duration-of-relationship requirement not as a reasonable legislative decision to exclude a particular type of risk from coverage, but instead as a method of assuring that payments are only made upon the occurrence of events the risk of which is covered by the insurance program.[11] Commercial insurance policies have traditionally relied upon fixed, prophylactic rules to protect against abuses which could expand liability beyond the risks which are within the general concept of its coverage. For example, life insurance policies often cover deaths by suicide, but not those suicides which were contemplated when the policy was purchased. Frequently the method chosen to contain liability within these conceptual bounds is a strict rule that deaths by suicide are covered if, and only if, they occur some fixed period of time after the policy is issued. See, *e. g.*, 9 Couch, Cyclopedia of Insurance Law § 40.50 (2d Ed. 1962). While such a limitation doubtless proves in particular cases to be "under-inclusive" or "over-inclusive," in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its terms. When the Government chooses to follow this tradition in its own social insurance programs, it does not come up against a constitutional stone wall. Rather, it may rely on such rules so long as they comport with the standards of legislative reasonableness enunciated in cases like *Dandrige* v. *Williams* and *Richardson* v. *Belcher.*

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[11] The Secretary also briefly argues that the duration-of-relationship requirement rationally serves the interest in providing benefits only for persons who are likely to have become dependent upon the wage earner. Brief for Appellants 11–12. In view of our conclusion with regard to his principal argument, we need not consider this justification.

Under those standards, the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in *Mourning, supra.* Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard.

The danger of persons entering a marriage relationship not to enjoy its traditional benefits, but instead to enable one spouse to claim benefits upon the anticipated early death of the wage earner, has been recognized from the very beginning of the Social Security program. While no early legislative history addresses itself specifically to the duration-of-relationship requirement for mother's and child's benefits, there were discussions of the analogous requirement for receipt of wife's benefits under § 402 (b). See 42 U. S. C. § 416 (b), defining "wife." Dr. A. J. Altmeyer, Chairman of the Social Security Board, noted that a five-year requirement "should be strict enough to prevent marriage in anticipation of larger benefit payments." Hearings on Social Security before the House Comm. on Ways and Means, 76th Cong., 1st Sess., 2297. Similarly, the Advisory Council on Social Security stated:

> "The requirement that the wives' allowance be payable only where marital status existed prior to the husband's attainment of age 60 is intended to serve as protection against abuse of the plan through the contracting of marriages solely for the purpose of acquiring enhanced benefits. If the marriage takes place at least 5 years before any old-age benefits can be paid, a reasonable assumption exists that it was contracted in good faith." *Id.,* at 31.

The Advisory Council also stated, with regard to § 402 (e) widow's benefits which, like mother's benefits, depend on the § 416 (c) definition of "widow":

> "As in the case of wives' allowances, it is believed desirable to protect the provisions for widows' benefits against abuse by the requirement of a minimum period of marital status." *Id.,* at 32.

Similar concerns were reflected in the House and Senate Reports on the 1946 amendment which reduced to three years the required duration of a marriage for the purposes of an eligible "wife." It was stated:

> "The original provision was intended to prevent exploitation of the fund by claims for benefits from persons who married beneficiaries solely to get wife's benefits. Experience has shown that the requirement is unnecessarily restrictive for this purpose and that, in a number of cases, a wife is permanently barred from benefits even though the marriage was entered into many years before the wage earner became a beneficiary. The amendment, taken with

> the provision in section 202 (b) that the wife be living with her husband in order to be eligible for benefits, should be sufficient protection for the trust fund and will remedy situations which now seem inequitable. Few persons are likely to marry because of the prospect of receiving a modest insurance benefit which will not be payable until after 3 years." H. R. Rep. No. 2526, 79th Cong., 2d Sess., 25; S. Rep. No. 1862, 79th Cong., 2d Sess., 33.

Later amendments to the Act have been accompanied by discussions of the duration-of-relationship requirements contained in the definitions of "widow" and "child." Like the early history of analogous requirements, they reflect congressional concern with the possibility of relationships entered for the purpose of obtaining benefits. In 1967, when the durational period was reduced from one year to nine months, the House report stated:

> "Your committee's bill would reduce the duration-of-relationship requirements for widows, widowers, and stepchildren of deceased workers from 1 year to 9 months. The present law contains a 1-year duration-of-relationship requirement which was adopted as a safeguard against the payment of benefits where a relationship was entered into in order to secure benefit rights. While the present requirements have generally worked out satisfactorily, situations have been called to the committee's attention in which benefits were not payable because the required relationship had existed for somewhat less than 1 year. Although some duration-of-relationship requirement is appropriate, a less stringent requirement would be adequate." H. R. Rep. No. 544, 90th Cong., 1st Sess., 56.

When in 1971 Congress added the provisions of 42 U. S. C. (Supp. II) § 416 (k)(2) (eliminating the nine-months requirement with respect to remarriages of persons who had previously been married for more than nine months), the House report observed that, "This duration-of-relationship requirement is included in the law as a general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights." H. R. Rep. No. 92-231, 92d Cong., 1st Sess., 55.

Undoubtedly the concerns reflected in this congressional material are legitimate, involving as they do the integrity of both the Social Security Trust Fund and the marriage relationship. It is also undoubtedly true that the duration-of-relationship requirement operates to lessen the likelihood of abuse through sham relationships entered in contemplation of imminent death. We also think that Congress could rationally have concluded that any imprecision from which it might suffer was justified by its ease and certainty of operation.

We note initially that the requirement is effective only within a somewhat narrow range of situations lacking certain characteristics which might reasonably be thought to establish the genuineness of a marital relationship which involves children (and thus the potential for mother's and child's benefits). Even though a surviving wife has not been married for a period of nine months immediately prior to her husband's death, she is nonetheless within the definition of "widow" if she meets one of the other disjunctive requirements of § 416 (c). If she is the mother of her late husband's son or daughter; if she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18; if he legally adopted her son or daughter under the same circumstances; or if during their marriage, however short, they legally adopted a child under the age of 18—in any of these circumstances the surviving wife may claim widow's or mother's benefits even though she has not been married to her husband for a full nine months.[12] The common denominator of these disjunctive requirements appears to us to be the assumption of responsibilities normally associated with marriage, and we think that Congress has treated them as alternative *indicia* of the fact that the marriage was entered into for a reason other than the desire to shortly acquire benefits. The marriages in which the widow must depend on qualifying under the nine-months requirement are those in which none of these other objective evidences of the assumption of marital responsibilities are present.

Even so, § 416 (c)(5) undoubtedly excludes some surviving wives who married with no anticipation of shortly becoming widows, and it may be that appellee Salfi is among them. It likewise may be true that the requirement does not filter out every such claimant, if a wage earner lingers longer than anticipated, or in the case of illnesses which can be recognized as terminal more than nine months prior to death. But neither of these facts necesarily renders the statutory scheme unconstitutional.

While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule which may not exclude some obviously sham arrangements, we think it clear that Congress could rationally choose to adopt such a course. Large numbers of people are eligible for these programs and are potentially subject to inquiry as to the validity of their relationships to wage earners. These people include not only the classes which appellees represent,[13] but also claimants in other programs for which the Social Security Act imposes duration-of-relationship requirements.[14] Not only does the prophylactic approach thus obviate the necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages. Nor is it at all clear that individual determinations could effectively filter out sham arrangements, since neither marital intent, life expectancy nor knowledge of terminal illness has been shown by appellees to be reliably determinable.[15] Finally, the very possibility of prevailing at a hearing could reasonably be expected to encourage sham relationships.

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[12] Similarly, the natural or adopted child of a deceased wage earner need not meet the nine-months requirement. See 42 U. S. C. (Supp. II) § 416 (e)(1).

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[13] According to the Social Security Administration, in calendar 1973 there were 125,000 applicants for mother's benefits, 1,313,000 for child's benefits, and 403,000 for widow's/widower's benefits. While these figures include large numbers of persons who qualify on bases other than the duration of their relationship with a wage earner, they also doubtlessly exclude persons who did not even apply because of the durational restriction, or who were thereby dissuaded from entering the relationship. A feel for the magnitude of the potential for case-by-case determinations can also be developed by reference to the Social Security Administration's estimate that judgment for the class which the named appellants sought to represent would involve payments of $30 million, assuming retroactivity to 1967. This figure does not reflect payments in behalf of persons who met the objective nine-months requirement, or who could not meet it and therefore either never applied or never entered the relationship.

[14] See 42 U. S. C. §§ 416 (b), (f), and (g), defining "wife," "husband" and "widower." These various definitions impose duration-of-relationship requirements with regard to wife's benefits, 42 U. S. C. § 402 (b), "husband's" benefits, 42 U. S. C. § 402 (c), and "widower's" benefits, 42 U. S. C. § 402 (f). In addition, "widow's" benefits, 42 U. S. C. § 402 (e), are available only to those women who satisfy § 416 (c)'s definition of "widow." "Parent's" benefits, 42 U. S. C. § 402 (h), are also subject to an objective eligibility requirement which is similar to a duration-of-relationship requirement. Under 42 U. S. C. § 402 (h)(3), stepparents and adopting parents may receive benefits with respect to a deceased child who was providing at least half of their support, but only if the marriage or adoption creating their relationship occurred prior to the child's 16th birthday.

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[15] Appellees do not contend that marital intent or life expectancy can be reliably determined. They argue, however, that because a marriage could not be entered in contemplation of imminent death unless the wage earner's "terminal illness" was known, the inquiry need go no farther than the issue of whether the parties to the marriage knew of such an illness. They claim that applicants could demonstrate the state of their knowledge by physicians' affidavits or documentary medical evidence. These contentions are not, however, supported by any factual rebuttals of the variety of difficulties which Congress was entitled to expect to be encountered. See *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961).

For example, all evidence of "knowledge of terminal illness" would ordinarily be under the control of applicants, which suggests that they should bear the burden of proof. But this burden could be convincingly carried only with respect to wage earners who happened to have had physical examinations shortly before their weddings; on the other hand, awarding benefits where the wage earner had not had an examination, and no medical evidence was available, would encourage participants in sham arrangements to conceal their own adverse medical evidence. Even when adequate medical evidence was available there could easily be difficulties in determining whether a wage earner's physical condition amounted to a "terminal illness"; if that concept was restricted to conditions which were virtually certain to result in an early death, benefits would probably be too broadly available, since certainty of imminent death rather than a mere high probability of it is not a prerequisite to a sham relationship; yet inquiries into the degree of likelihood of death could become very complex indeed.

Additional problems with appellees' proposed test arise because it, like the duration-of-relationship requirement, is not precisely related to the objective of denying benefits which are sought on the basis of sham relationships. In the first place, it presumably would be necessary to limit the requirement of terminal illness inquiries to instances in which death occurred within a specified period after marriage. It would also appear to be necessary to set an outside limit on the length of the period within which death was expected

The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal. In this sense, the duration-of-relationship requirement represents not merely a substantive policy determination that benefits should be awarded only on the basis of genuine marital relationships, but also a substantive policy determination that limited resources would not be well spent in making individual determinations. It is an expression of Congress' policy choice that the Social Security system, and its millions of beneficiaries, would be best served by a prophylactic rule which bars claims arising from the bulk of sham marriages

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that would disqualify applicants (after all, and paraphrasing Lord Keynes, in the long run we are all expected to die). Yet there will always be persons on one side of such lines who are seriously disadvantaged vis-á-vis persons on the other side. More basically, appellees' test would clearly exclude persons who knew of a wage earner's imminent death, but who entered their marriages for reasons entirely unrelated to Social Security benefits, such as to fulfill the promises of a long-standing engagement. Thus appellees' proposed test would be subject to exactly the same constitutional attacks which they direct towards the test on which Congress chose to rely.

Appellees point out that 42 U. S. C. (Supp. II) § 416 (k) provides for limited exceptions to the duration-of-relationship requirement, unless the Secretary determines that at the time of the marriage the wage earner "could not have reasonably been expected to live for nine months." They argue that this represents Congress' recognition that case-by-case consideration would not impose an inordinate administrative burden. The argument is without merit. Section 416 (k) expresses Congress' willingness to accept case-by-case inquiries with regard to limited classes which bear particular indices of genuineness (the section is available in cases of accidental death, death in the line of military duty, and remarriages of persons previously married for more than nine months). This says nothing about the feasibility of making such inquiries in other circumstances, much less the rationality of choosing not to do so.

which are actually entered, which discourages such marriages from ever taking place, and which is also objective and easily administered.

The Constitution does not preclude such policy choices as a price for conducting programs for the distribution of social insurance benefits. Cf. *Geduldig* v. *Aiello, supra,* at 496. Unlike criminal prosecutions, or the custody proceedings at issue in *Stanley* v. *Illinois,* such programs do not involve affirmative government action which seriously curtails important liberties cognizable under the Constitution. There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

The judgment of the District Court is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 74–214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants, *v.* Concetta Salfi et al.	On Appeal from the United States District Court for the Northern District of California.

[June 26, 1975]

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that because there is clearly jurisdiction the Court's extended discussion of the subject is unwarranted.

On the merits, I believe that the main problem with these legislatively created presumptions is that they frequently invade the right to a jury trial. See *Tot* v. *United States,* 319 U. S. 463, 473 (1943) (concurring opinion). The present law was designed to bar payment of certain Social Security benefits when the purpose of the marriage was to obtain such benefits. Whether this was the aim of a particular marriage is a question of fact, to be decided by the jury in an appropriate case. I therefore would vacate and remand the case to give Mrs. Salfi the right to show that her marriage did not offend the statutory scheme, that it was not a sham.

SUPREME COURT OF THE UNITED STATES

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[June 26, 1975]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The District Court did not err, in my view, either in holding that it had jurisdiction by virtue of 28 U. S. C. § 1331, or in holding that the nine-month requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) are constitutionally invalid.

I

Jurisdiction

The jurisdictional issue to which the Court devotes 10 pages, only to conclude that there is indeed jurisdiction over the merits of this case both here and in the District Court, was not raised in this Court by the parties before us nor argued, except most peripherally,[1] in the briefs or

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[1] The Government in its Jurisdictional Statement raised as one of the Questions Presented "whether sovereign immunity bars this [suit] *insofar as it seeks retroactive social security benefits.*" Jurisdictional Statement, at 2 (emphasis supplied). Its argument was that no retroactive benefits were available to the class, because 28 U. S. C. § 1331 does not waive sovereign immunity, because 42 U. S. C. § 405 (h) bars a suit *seeking retroactive benefits* except under § 405 (g), and because the exhaustion requirements of § 405 (g) were not met. Brief for the Appellant, at 16–18. See also Tr. of Oral Arg., at 7–8:

[*Footnote 1 is continued on p. 2*]

at oral argument. The question involves complicated questions of legislative intent and a statutory provision, 42 U. S. C. § 405 (h), which has baffled district courts and courts of appeals for years in this and other contexts.[2] Of course, this Court is always obliged to inquire

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"Question: . . . [I]s the United States satisfied there was jurisdiction in the district court here?

"Mrs. Shapiro: We are not satisfied that there was jurisdiction to *the extent that it . . . identified a class and required retroactive payments to all members of the class.*" (Emphasis supplied.)

Thus, the Government never claimed here that the District Court was without jurisdiction over the merits of this case, for it conceded, apparently, jurisdiction to grant declaratory and injunctive relief.

[2] See, *e. g.*, on the effect of §§ 405 (g) and (h) on cases seeking to invalidate as unconstitutional a provision of Title II of the Social Security Act, *Bartley* v. *Finch*, 311 F. Supp. 876 (ED Ky. 1970), aff'd on the merits, 404 U. S. 980 (1971); *Gainville* v. *Richardson*, 319 F. Supp. 16 (1970); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (Md.), aff'd, 409 U. S. 1069 (1972); *Diaz* v. *Weinberger*, 361 F. Supp. 1 (SD Fla. 1973); *Wiesenfeld* v. *Weinberger*, 367 F. Supp. 981 (NJ 1973), aff'd, — U. S. — (1975); *Kohr* v. *Weinberger*, — F. Supp. — (ED Pa. 1974) (Jurisdictional Statement pending, No. 74-5538).

Bartley v. *Finch*, *supra*, was the only one of these cases holding that § 405 (g) is the *exclusive* means of determining the constitutionality of a provision of the Social Security Act, and that there was, because of noncompliance with § 405 (g), no jurisdiction. The District Court then went on to decide the merits. This Court's affirmance was explicitly on the merits, and thus must be taken to have held that there *was* jurisdiction even though § 405 (g) was not complied with.

Other courts have grappled with §§ 405 (g) and (h) in other contexts. See, *e. g.*, *Filice* v. *Celebrezze*, 319 F. 2d 443 (CA9 1963); compare *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (CA2 1966), with *Stuckey* v. *Weinberger*, 488 F. 2d 904 (CA9 1973) (en banc). In *Cappadora*, *supra*, Judge Friendly, in considering the application of §§ 405 (g) and (h) to review of a decision not to reopen a claim into its own jurisdiction, when there is a substantial question about whether jurisdiction is proper either in the lower courts or in this Court. But since here there is, according to the Court, jurisdiction over the cause of action in any event,[3] I would have thought it the wiser course merely to note that there was jurisdiction in the District Court *either* under 28 U. S. C. § 1331 *or* under 42 U. S. C. § 405 (g), leaving the resolution of the question of which is applicable to a case in which the decision is of some consequence, and in which the parties have, either of their own volition or upon request of the Court, briefed and argued the issue.[4] Surely, the Court does not intend to adopt a new policy of always on its own

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of statutory qualification, cautioned against overly literal interpretation of the sections. 356 F. 2d, at 4, 5.

[3] If the Court had determined to affirm on the merits, then the question actually raised by the Government—whether there is jurisdiction to award retroactive benefits despite noncompliance with § 405 (g)—may have been fairly before us, and may have entailed canvassing the jurisdictional questions the Court today discusses. But since the Court reverses on the merits, the *source* of the District Court's jurisdiction is immaterial and, particularly, it is irrelevant whether or not there was jurisdiction over the class complaint. The Court's decision on the latter question, *ante,* at 11, can only be characterized as dicta.

[4] In *Norton* v. *Weinberger,* No. 74–6212, which is set for hearing next Term, — U. S. — (1975), the District Court did not declare the contested portion of Title II of the Social Security Act unconstitutional, and we therefore lack jurisdiction under 28 U. S. C. § 1252. Thus, if § 405 (g) is the exclusive route for determination of constitutional attacks on Title II, and if, as the Court suggests, *ante,* at 10 n. 8, there is a question regarding the power of a court to grant an injunction under § 405 (g), we could be without jurisdiction under 28 U. S. C. § 1253 in *Norton* because the three-judge court, without power to enjoin the statute, was improperly convened under 28 U. S. C. § 2282. Thus, *Norton,* unlike this case, would be the appropriate vehicle for determination of the jurisdictional question decided today.

canvassing, with a full discussion, all jurisdictional issues lurking behind every case, whether or not the issue has any impact at all on the resolution of the case.

Because the Court nonetheless treats the question fully, I am obliged to do so as well. For, at least insofar as my own research and consideration, unaided by the help ordinarily offered by adversary consideration, is adequate, I am convinced that the Court is quite wrong about the intended reach of § 405 (h), and that its construction attributes to Congress a purpose both contrary to all established notions of administrative exhaustion and absolutely without support in the clear language or legislative history of the statute. Further, today's decision is in square conflict with *Johnson* v. *Robison,* 415 U. S. 361 (1974). And finally, even if § 405 (g) is the exclusive route for adjudicating actions seeking payment of a claim, I do not see how it can apply to the declaratory and injunctive aspects of this suit.

A

The Court rejects the District Court's conclusion that § 405 (h) is no more than a codified requirement of administrative exhaustion on the basis of the third sentence of the section, which it characterizes as ". . . sweeping and direct and [stating] that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Ante,* at 5. But the sentence does not say that no action of any kind shall be brought under § 1331, or other general grants of jurisdiction, which may result in entitling someone to benefits under Title II of the Act; it says merely that no action shall be brought under § 1331 *et seq.* "to *recover* on any claim *arising under* [Title II]." (Emphasis supplied.) This action, I believe, does not "arise under" Title II in the manner intended by § 405 (h), and it is, at least in part, not an action to "recover" on a claim. See Parts B and C, *infra.*

Section 405 (h), I believe, only bans, except under § 405 (g), suits which arise under Title II in the sense that they require the application of the statute to a set of facts, and which seek nothing more than a determination of eligibility claimed to arise under the Act. Thus, I basically agree with the District Court that § 405 (h), including its last sentence, merely codifies the usual requirements of administrative exhaustion. The last sentence, in particular, provides that a plaintiff cannot avoid § 405 (g) and the first two sentences of § 405 (h) by bringing an action under a general grant of jurisdiction claiming that the Social Security Act *itself* provides him certain rights. Rather, on *such* a claim a plantiff *must* exhaust administrative remedies, and the District Court is limited to *review* of the Secretary's decision, in the manner prescribed by § 405 (g).

The Court suggests that this reading of § 405 (h) makes the last sentence redundant. But this is the reading which the Social Security Board itself gave to the provision soon after it went into effect. In a document prepared for and approved by the Board in January 1940 as an outline of the procedures to be followed under the newly enacted Social Security Act Amendments of 1939,[5] the interaction between §§ 405 (g) and (h) is described as follows:

> "The judicial review section of the act, section [405 (g)], provides for civil suits against the Social

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[5] Sections 405 (g) and (h) were part of these Amendments. See Social Security Act Amendments of 1939, c. 666, Title II, § 201, 53 Stat. 1362. Before that, the Social Security Act contained no explicit provisions concerning judicial review. See H. R. Rep. No. 728, 76th Cong., 1st Sess., 43 (1939).

> Security Board in the United States District Courts. These may be filed by parties to hearings before the Board who are dissatisfied with final decisions of the Board. The review of the Board's actions in these suits will consist of a review of the Board's records in these cases. *Thus, on the one hand, the Board is protected against the possibility of reversals of its decisions in separate actions filed for that purpose. Actions of this kind are explicitly excluded by section* [405 (h)]. On the other hand, judicial review on the basis of the Board's record in the cases makes it necessary that the record in each case be in the best possible state so as to avoid difficulties if a challenge in court occurs."

Federal Security Agency, Social Security Board, Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims With a Discussion of Certain Administrative Problems and Legal Consideration (1940) in Attorney General's Committee on Administrative Procedure, Administrative Procedures in Government Agenices, Sen. Doc. No. 10, 77th Cong., 1st Sess., 39 (1941). Since the last sentence of § 405 (h) is the only part of the section which "explicitly exclude[s]" any "action," the italicized portion obviously refers to that sentence.

Thus, the agency responsible for the enforcement of Title II adopted a construction of the statute which gave the last sentence the very meaning which the Court now rejects as "superfluous" and "already performed by other statutory provisions." *Ante*, at 5, 7 and n. 6. As explained in the margin,[6] the sentence is not superfluous, and the Board obviously did not regard it as such. Administrative interpretations by agencies of statutes which they administer are ordinarily entitled to great weight, see, *e. g., Johnson* v. *Robison, supra,* 415 U. S., at 367-368; *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965). And in this instance, the contemporary Social Security Board was intimately involved in the formulation of the 1939 amendments,[7] and thus must be presumed to have had insight into the legislative intent.[8]

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[6] The Court argues, *ante*, at 7 n. 6, that if the third sentence of § 405 (h) merely forbids a bypass of § 405 (g) via a separate action not framed as a review of the Secretary's decision, it is superfluous because an application is a prerequisite to entitlement and "[o]nce the application is filed, it is either approved . . . or it is denied,"

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resulting in a decision of the Secretary which, under the second sentence of § 405 (h), cannot be reviewed "save pursuant to § 405 (g)." This analysis is faulty in several respects. First, without the last sentence of § 405 (h), an applicant might first file an application and then, before it is acted upon at all, file a suit for benefits under Title II. Second, it is not true that *all* entitlement to benefits hinge upon filing an application. In some instances, a person already receiving one type of benefits need not file a new application in order to receive another category of benefits. See, *e. g.,* § 402 (e)(1)(c)(ii); § 402 (f)(1)(c); § 402 (g)(1)(D). Finally, even if an application has been filed and a decision made upon it, the applicant might try to file a suit seeking not review of the administrative record but a *de novo* determination of eligibility. This would raise the question whether the second section of § 405 (g) should be read only to prescribe the *way* in which the administrative record "shall be reviewed"; the third sentence makes clear however that no action *except* review of the administrative record is available for suits claiming eligibility *under* the statute.

[7] See Report of the Social Security Board, Proposed Changes in the Social Security Act, H. R. Doc. No. 110, 76th Cong., 1st Sess. (1939); Hearings Relative to the Social Security Act Amendments of 1939 before the House of Representatives Committee on Ways and Means, 76th Cong., 1st Sess. (1939), at 45–69, 2163–2433 (Testimony of Dr. Altemeyer, Chairman of the Social Security Board).

[8] Other indices of legislative intent and administrative interpretation, although sparse, also suggest that §§ 405 (g) and (h) were intended and interpreted as nothing more than a codification of ordinary administrative exhaustion requirements, applicable to cases presenting questions of fact and of interpretation of the statute. The 1939 Report of the Social Security Board, see n. 7, *supra,* suggested that the Amendments include a "[p]rovision that findings of

Indeed, to adopt the Court's view of the last sentence of § 405 (h) is, as far as I can determine, to assume that it was inserted precisely to cover the situation here—a suit attacking the constitutionality of a section of Title

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fact and decisions of the Board in the allowance of claims shall be final and conclusive. Such a provision would follow the precedent of the World War Veterans' Act and other legislation with respect to agencies similar to the Board which handle a large number of small claims." *Id.*, at 13. At the hearings on the Amendments, Dr. Altemeyer, Chairman of the Board, explained this recommendation as "follow[ing] the precedent laid down in . . . other acts, *where there is a volume of small claims, and where a review of the findings of fact would lead to . . . duplicate administration of law.*" Hearings, n. 7, *supra,* at 2288. (Emphasis supplied.) Thus, in its inception the exhaustion provisions which became §§ 405 (g) and (h) were clearly intended to apply only to run-of-the-mill claims under the statutory provisions, in which factual determinations would be paramount.

The House of Representatives Report says, of 405 (g): "The provisions of this subsection are similar to those made for the review of many administrative bodies." H. R. Rep. No. 727, 76th Cong., 1st Sess., 43 (1939). The Report describes § 405 (h) basically in its own words. *Id.*, at 43–44. There is no indication that the latter section was intended in any way to alter the intent indicated by the quoted sentence—to legislate only ordinary administrative exhaustion requirements.

Finally, a statement inserted by Mr. Mitchell, Commissioner of Social Security, into the record of the 1959 Hearings on the Administration of the Social Security Disability Insurance Program, before the Subcommittee on the Administration of the Social Security Law of the House of Representatives Committee on Ways and Means, 86th Cong., 1st Sess., at 977, again reflects the view that §§ 405 (g) and (h) together merely reiterate, even if a bit redundantly, that "the jurisdiction of a court to review a determination the Secretary is limited to a review of the record made before the Secretary. This is made amply clear by the second and third sentences of § [405 (g)] and by the provisions of section [405 (h)] . . . . The court has no power to hold a hearing and determine the merits of the claim because the statute makes it clear that the determinations of claims is solely a function of the Secretary."

II and seeking to establish eligibility *despite* the provisions of the statute. Yet, the Court is able to point to no evidence at all that Congress was concerned with this kind of lawsuit when it formulated these sections, and I have not been able to find any either.

Without any clear evidence, indeed without any evidence, the Court should not attribute to Congress an intention to filter through § 405 (g) this sort of constitutional attack. "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Oestereich* v. *Selective Service Board,* 393 U. S. 233, 242 (1968) (Harlan, J., concurring in result); *Johnson* v. *Robison,* 415 U. S. 361, 368 (1974).[9] See K. Davis, III Administrative Law Treatise § 20.04 (1958). Thus, in a case such as this one, in which no facts are in dispute and no other sections of the Act are possibly applicable, "the only question of exhaustion is whether to require exhaustion of nonexistent administrative remedies." K. Davis, *supra,* at 78. See *Aircraft and Diesel Equipment Corp.* v. *Hirsh,* 331 U. S. 752, 773 (1947). To assume, with no basis in the legislative history or in the clear words of the statute, that Congress intended to require exhaustion in this kind of case, is to impute to Congress a requirement of futile exhaustion, in which the only issues in the case are not discussed, in which the actual issues are in no way clarified, in which no factual findings are made, and in which there is no agency expertise to apply. I see no basis for imputing such an odd intent, especially since, as discussed below, I believe the clear import of the wording of the statute is to the contrary.

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[9] At least twice, claimants who attempted to exhaust pursuant to § 405 (g) on a constitutional attack on Title II have been met with an administrative holding that constitutional claims are beyond the competence of the administrative agency. See *In the case of Ephram Nestor,* Referee's Decision, January 31, 1958, in Tr. of Record 9, *Flemming* v. *Nestor,* 363 U. S. 603 (1960); *In the case of Lillian Daniels,* Administrative Law Judge's Decision, November 14, 1973, in Respondent's Motion to Affirm and/or Dismiss, at 21. This administrative determination of the agency's jurisdiction is due great deference. *Johnson* v. *Robison,* 415 U. S. 361, 367-368 (1974).

B

I think it quite clear that a claim "arising under" Title II is one which alleges that the subchapter grants someone certain rights. This claim does not "arise under" the subchapter because, if the statute itself were applied, Mrs. Salfi would certainly lose. Instead, this case "arises under" the Constitution and seeks to hold invalid the result which would be reached under the statute itself. *Johnson* v. *Robison, supra,* as well as cases construing the meaning of "arising under" in other jurisdictional statutes,[10] dictate this result.

In *Johnson,* construing the language which appears *ante,* at 8, we said, 415 U. S., at 367:

> "The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. . . . Thus, . . . '[t]he questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged.' " (Citation omitted.)

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[10] The last sentence of § 405 (h), upon which the Court relies so heavily, refers expressly to old § 41 of Title 28, now 28 U. S. C. § 1331 *et seq.* Thus, it is appropriate to assume that "arising under" is used in § 405 (h) in the same sense as it is used in the general jurisdictional statutes.

The Court, *ante,* at 8–9, suggests that this interpretation turned on the precise wording of the statute construed in *Johnson,* specifically on the words "decisions . . . on any question of law and fact." First, as the quotation above shows, *Johnson* in fact concentrated not upon what constitutes a "decision" of the administrator but upon what is a decision "under" a statute. But more significantly, the statute construed in *Johnson* had, between 1957 and 1970, read:

> "[D]ecisions of the Administrator on any question of law or fact *concerning a claim for benefits or payments* under any law administered by the Veterans Administration shall be final and conclusive . . . ." Veterans Benefits Act of 1957, 71 Stat. 92 (emphasis supplied). See *Johnson, supra,* 415 U. S., at 368–369, n. 9.

The italicized language is obviously quite similar to that used in § 405 (h). The Court opinion in *Johnson* made clear that the holding that the section does not apply to constitutional attacks on veterans' benefits legislation encompasses all prior versions of the section, and that the "claim for benefits" language in no way affected this construction of the statute.[11]

Aside from *Johnson,* our cases concerning the meaning of "arising under" in the jurisdictional statutes affirm that this claim arises under the Constitution and *not* under the Social Security Act. We have consistently held that a controversy regarding title to land does not "arise under" federal law "merely because one of the parties to it has derived his title under an act of Congress." *Shulthis* v. *McDougal,* 225 U. S. 561, 570 (1912). See *Oneida Indian Nation* v. *County of Oneida,* 414 U. S. 661, 676 and n. 11 (1974). Rather, "a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the . . . laws of the United States." *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, 507 (1900); *Oneida Nation, supra,* 414 U. S., at 683 (REHNQUIST, J., concurring). Unless the dispute requires, for its resolution, a decision concerning federal law, the case does not arise under federal law even if, but for a federal statute, there would be no right at all. *Shulthis* v. *McDougal, supra,* 225 U. S., at 569; *Oneida, supra,* 414 U. S., at 677.

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[11] *Johnson* discusses at length the reasons why the "concerning a claim for benefits or payments" language was eliminated. 415 U. S., at 371–373. These reasons had nothing to do with the problem of constitutional attacks presented in *Johnson* and presented here. The Court concluded: "Nothing whatever in the legislative history of the 1970 amendment, or *predecessor no-review clauses,* suggests any congressional intent to preclude judicial cognizance of constitutional challenges to veterans' benefits legislation." 415 U. S., at 373. (Emphasis supplied.)

Thus, "arising under" is a term of art in jurisdictional statutes referring, at least in part, to the body of law necessary to consider in order to determine the rights in question. Here, there is no dispute about the application of the Social Security Act; the only controversy concerns whether the Constitution permits the result which the Social Security Act would require. Therefore, this case does not concern a "claim arising under" Title II, and is not precluded by the last sentence of § 405 (h) from consideration under 28 U. S. C. § 1331.

C

Not only does this case not concern a "claim arising under" Title II, but it is, at least in part, not an "action . . . to *recover* on any claim." (Emphasis supplied.) A three-judge District Court dealt with the "recover on [a] claim" aspect of § 405 (h) in *Gainville* v. *Richardson,* 319 F. Supp. 16, 18 (Mass. 1970).[12] Judge Wyzanski wrote concerning the effect of the last sentence of § 405 (h):

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[12] This Court, 409 U. S. 1069 (1972), affirmed *Griffin* v. *Richard-*

> "In the present action, while plaintiff does, perhaps improperly, seek damages, his complaint also has prayers for a declaratory judgment that § 203 (f)(3) of the Social Security Act, 42 U. S. C. § 403 (f)(3) is unconstitutional, and for an injunction restraining defendant from applying that section. If he were to be successful with respect to those prayers, plaintiff would not, in the language of the statute, 'recover on any claim' for benefits. For recovery of benefits he would still need to resort to the administrative process. The only effect of a declaratory judgment or injunction by this court would be to preclude the Secretary from making the challenged deduction."

This holding seems eminently sensible to me. The legislative history and administrative interpretation of § 405 (h), *supra,* at 5–7 and n. 8, reveal no basis for supposing that the section was to apply to suits which did not request immediate payment of a claim as part of the relief. To construe the statute to cover all actions which may later, *after* administrative consideration, result in eligibility under Title II is to mutilate the statutory language.

The holding in *Gainville, supra,* applies squarely to this case. The complaint sought declaratory and injunctive relief with respect to both the named plaintiffs and the class, as well as retroactive benefits. App., at 12–13. The injunction sought was *either* an order to provide benefits *or* "an opportunity for a hearing on the genuineness of their status, [for] plaintiffs and all those similarly

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son, 346 F. Supp. 1226, 1230 (Md.), which expressed basically the same view, albeit somewhat less clearly.

situated." App., at 13. Thus, even if § 405 (h) precludes granting retroactive benefits except under § 405 (g), it would not, under the rationale of *Gainville, supra,* preclude granting any declaratory and injunctive relief to the class, since the relief requested would not necessarily be tantamount to recovery in a claim. Indeed, the Government seems to have conceded as much in this case, since it argued here that §§ 405 (g) and (h) were preclusive *only* with regard to retroactive benefits, see n. 1, *supra.*

The Court concludes that there was jurisdiction over the claim for retroactive benefits for the named plaintiffs under § 405 (g). (But see Part D, *infra.*) Under the *Gainville* rationale, there would be jurisdiction under § 1331 over the claims for class declaratory and injunctive relief. And if there was jurisdiction under one jurisdictional statute or another for each part of the action, surely there was jurisdiction over the whole.[13]

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[13] Although this case was argued here as if the District Court granted retroactive benefits to the class, I am not sure this is so. The injunction issued ordered the secretary

"to provide benefits, from the time of original entitlement, to plaintiffs and each member of the class they represent, *provided only that in each case such persons are otherwise fully eligible to receive the benefits.*" 373 F. Supp. 961, 966 (1974). (Emphasis supplied.)

As the Court points out, *ante,* at 7 n. 6, in most instances, see n. 6, *supra,* a person is not "eligible" for benefits until he files an application. Further, the order obviously contemplates administrative proceedings in order to determine whether "such persons are otherwise fully eligible." Finally, if exhaustion of § 405 (g) is indeed, as the Court holds, always a prerequisite to eligibility, then a person would not be "otherwise fully eligible" unless and until he exhausts § 405 (g). Thus, I believe that the order can be read not to mandate retroactive benefits but only to require that claims of the class members be treated as if the 9-months marriage requirement did not exist. Such an order does not constitute recovery on a claim and, in my view, was proper under 28 U. S. C. § 1331.

D

Finally, even if I could agree, and I do not, that § 405 (g) is the exclusive route for consideration of this kind of case, I would dissent from the Court's treatment of the exhaustion requirement of § 405 (g), *ante,* at 11–14. The Court admits, *ante,* at 12, that the purposes of administrative exhaustion "have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act." Nonetheless, the Court construes the statute so as to permit "the *Secretary* [to] specify such requirements for exhaustion as *he deems* serve *his own* interests in effective and efficient administration . . . . [A] court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary." *Ante,* at 13–14. (Emphasis supplied.)

If, as the Court holds, the finality and hearing requirements of § 405 (g) are not jurisdictional,[14] *ante,* at 13, then I fail to see why it is left to the Secretary to determine when the point of futility is reached, a power to be exercised, apparently, with regard only to the Secretary's needs and without taking account of the claimants' interest in not exhausting futile remedies,[15] and in obtaining promptly benefits which have been unconstitutionally denied. Further, the Court leaves the way open for a lawless application of this power, since the Secretary can evidently, once the case is in court, assert or not assert the full exhaustion requirements of § 405 (g), as he pleases.

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[14] The Court has to ignore plain language of the statute in order to avoid the absurd result of requiring full exhaustion on *all* claims such as this one, even after the point of futility is reached. The statute says that judicial review can be had only "after a hearing," § 405 (g), and it is apparent that the hearing contemplated is a full, evidentiary hearing, see § 405 (b). Rather than avoiding the statutory language by holding that the Secretary can nonetheless dispense with a hearing, the Court would do better to recognize that the patent inapplicability of the statutory language to this kind of case suggests that the statute was never intended to apply at all to constitutional attacks beyond the Secretary's competence.

Moreover, and significantly, it flagrantly distorts the record in this case to say that the Secretary waived the exhaustion requirements of § 405 (g), recognizing their futility. True, the Secretary does not *here* claim a lack of jurisdiction for failure to exhaust on the individual claim, see n. 1, *supra*. But he did, in the district court, move to dismiss the entire action for lack of subject matter jurisdiction. See Notice and Motion to Dismiss or for Summary Judgment, Rec. at 114–117. The Secretary said, referring to §§ 405 (g) and (h):

> "From the above provisions, it is clear that the only civil action permitted to an individual on any claim arising under Title II of the Act is an action

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[15] Indeed, in some cases similar to this one, administrative exhaustion is functionally impossible. For example, in *Weinberger* v. *Wiesenfeld*, — U. S. — (1975), the applicant was ineligible for benefits because he was a man, a fact obviously apparent as soon as he appeared at the Social Security office. Not surprisingly, he was refused an opportunity even to file an application for benefits. *Id.*, at — n. 6. This case is slightly different, since Mrs. Salfi was precluded not by the obvious fact of her sex, but by a fact which presumably did not appear until she filled out the application—that she had not been married long enough. Yet, the Court suggests that we had jurisdiction in *Wiesenfeld* only because of a stipulation that exhaustion would have been futile. *Ante*, at 14 n. 10. Does this intimate that the Secretary could have refused to waive exhaustion and thereby have eliminated § 405 (g) jurisdiction, even though Wiesenfeld could not possibly have complied with the statute without wrestling an application from the clerk and somehow forcing him to file it?

> to review the 'final decision of the Secretary made after a hearing . . . .' The complaint, however, does not allege jurisdiction under section [405 (g)] . . . . Moreover, *there has been no 'final decision' by the Secretary on the matters here complained of . . . and plaintiffs have not exhausted their administrative remedies.* [Emphasis supplied.] The exhaustion of any available administrative remedies is a *condition precedent* to the plaintiffs [*sic*] bringing this action against the defendants, and the issue is one of subject matter jurisdiction." Defendants' Memorandum in Opposition to the Plaintiffs' Motion for Preliminary Injunction, Rec., at 65.

In the face of this statement, the Court's conclusion that the Secretary determined "that for the purposes of this litigation the reconsideration determination is 'final.'" *Ante,* at 14, is patently indefensible.

II

The merits of this case can be dealt with very briefly. For it is, I believe, apparent on the face of the Court's opinion that today's holding is flatly contrary to several recent decisions, specifically *Vlandis* v. *Kline*, 412 U. S. 441 (1973), *U. S. Dept. of Agriculture* v. *Murry*, 413 U. S. 508 (1973), and *Jiminez* v. *Weinberger*, 417 U. S. 628 (1974).

In *Vlandis,* we said, 412 U. S., at 446, "permanent irrebutable presumptions have long been disfavored under the Due Process Clause of the Fourteenth Amendment." The Court today distinguishes *Stanley* v. *Illinois,* 405 U. S. 645 (1972) and *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974), two cases which struck down conclusive presumptions, because both dealt with protected rights, while this case deals with "a noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status." *Ante*, at 19. But *Vlandis* also dealt with with a government benefit program—the provision of an education at public expense. Since the Court cannot dispose of *Vlandis* as it does *Stanley* and *LaFleur*, it attempts to wish away *Vlandis* by noting that "where Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on the issue."

Yet, the Connecticut statute in *Vlandis* did not set "residency," undefined, as the criteria of eligibility; it *defined* residency in certain ways. The definitions of "resident" were precisely parallel to the statute here, which defines "widow" and "child" in part by the number of months of marriage, 42 U. S. C. § 416 (c); § 416 (e).

Similarly, *Murry*, *supra*, and *Jiminez*, *supra*, both dealt with conclusive presumptions contained in statutes setting out criteria for eligibility for government benefits. The Court distinguishes them as cases in which "the criteria bear no rational relation to a legitimate legislative goal." But if the assumptions in *Murry* and *Jiminez* were irrational, the presumption in this case is even more irrational. We have been presented with no evidence at all that the problem of collusive marriages is one which exists at all. Indeed, the very fact that Congress has continually moved back the amount of time required to avoid the irrebutable presumption, *ante*, at 25–27, suggests that it found, for each time period set, that it was depriving deserving people of benefits without alleviating any real problem of collusion. There is no reason to believe that the nine-month period is any more likely to discard a high proportion of collusive marriages than the five-year, three-year, or one-year periods employed earlier.

The Court says: "The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal." *Ante,* at 31. But, as we said in *Stanley* v. *Illinois, supra:*

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they are designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy officials no less, and perhaps more, than mediocre ones." 405 U. S., at 656.

This is not to say, nor has the Court ever held, that *all* statutory provisions based on assumptions about underlying facts are *per se* unconstitutional unless individual hearings are provided. But in this case, as in the others in which we have stricken down conclusive presumptions, it *is* possible to specify those factors which, if proven in a hearing, would disprove a rebuttable presumption. See, *e. g., Vlandis, supra,* at 452. For example, persuasive evidence of good health at the time of marriage would be sufficient, I should think, to disprove that the marriage was collusive. Also, in this case, as in *Stanley,* 405 U. S., at 655, and *LaFleur,* 414 U. S., at 643, the presumption, insofar as it precludes people as to whom the presumed fact is untrue from so proving, runs counter to the general legislative policy—here, providing true widows and children with survivors' benefits. And finally, the presumption here, like that in *Vlandis, Murry,* and *Jiminez,* involves a measure of social opprobrium; the assumption is that the individual has purposely undertaken to evade legitimate requirements. When these factors are present, I believe that the Government's interests in efficiency must be surrendered to the individual's interest in proving that the facts presumed are not true as to him.

I would affirm the judgment of the District Court.

Statement of the United Mine Workers of America

Delay: A housebound disabled miner greets the postman on the porch day after day, month after month, and searches through the bills and circulars each day for notice of a decision on his black lung claim. . . .

He dies, and months later his widow writes us, for there has still been no notice, and she has nothing but food stamps to live on. . . .

A once proud worker furtively glances around as he makes an infrequent trip to town stepping out of the sight of old friends. He has borrowed from every one he knows, one after another, to pay his rent and keep his kids in school, promising over and over to pay them back in just a few more days. . . .

Bottles of librium and valium and stronger stuff sit in a medicine chest that once held only toothpaste and baby aspirin. Besides the pills to ease the pain of injury, the doctor has prescribed pills to ease the building tension of not knowing, of waiting, waiting, waiting. . . .

A little girl whose daddy promised her a new coat when she started school in September, still waits, still tries to believe in her daddy when the spring flowers bloom. . . .

Down the road a coal miner coughs and chokes and gets weaker every day as he drags himself into the mines, into the dust that is slowly but certainly killing him. He quit once, when his doctor told him he could qualify for black lung benefits. But after 10 months of waiting, he went back to the mines, preferring the agony of his own physical pain to the misery of a family turning against one another under the pressure of uncertainty and want.

These examples may seem maudlin, or extreme. But in fact they are only day to day commonplaces among the thousands of families whose economic future has become entangled in the Social Security appeals system.

Viewed from an administrative point of view, delay becomes a technical managerial problem. But viewed from the perspective of those who wait, delay means needles human suffering. This should hardly need to be said to a committee which has been convened to consider the problem of delay. But in reviewing the testimony presented thus far, we felt it would be easy for a committee to become ensnared itself in the tangle of red tape that threatens to choke these programs.

The people who sign up for Social Security, SSI, and black lung benefits are the weak, the aged, and the miserable. As a matter of elementary humanity, this country must guarantee that the application process itself will not add to their misery.

Solving the problem of delay is easily within the reach of our knowledge and within the capacity of our resources. Many agencies of government and most private businesses are able to handle their affairs promptly. What is necessary, in the case of the Social Security adjudication process, are these three elements: (1) A clear Congressional insistence upon the prompt processing of claims: (2) a commitment of sufficient human and organizational resources to clear up the backlo gand then to keep the caseload current; and (3) provision for effective redress in individual cases of delay. We will consider these three elements in turn:

1. *A Clear Congressional Mandate.* The black lung and Social Security programs are relatively unique in their lack of any time limits for processing claims. The individual claimant is subject to time limits: he must request a hearing within 6 months, appeal to the Appeals Council within 60 days, and to Federal court within 60 days of an unfavorable decision. Claimants become understandably angry when they realize that the agency is not required to play by a similar set of rules.

As a first step toward solving the problem of delay, Congress should set *statutory time limits* for the processing of appeals. We believe the following time limits are reasonable:

a. A hearing should be held within 30 days after it has been requested.

b. A decision should be issued within 30 days after the hearing.

c. The Appeals Council should grant or deny a request for review within 30 days after it has been requested.

d. The Appeals Council should review a claim within 45 days after it has granted a request for review.

e. A check should be issued within 15 days of a favorable decision.

Except for the last, any of the above time limits could be extended by the claimant for good cause.

These time limits are consistent with the time limits which now apply in similar Federal programs. Regulations of the Secretary of Labor issued pursuant to section 303(a)(1) of the Social Security Act require that 75 percent of first level benefit appeal decisions in unemployment compensation cases be issued within 30 days of the date of filing of the appeal, and that 85 percent of these decisions be issued within 45 days of the date of filing of an appeal. 20 C.F.R. Part 650. In the federal food stamp program a hearing must be held, a decision made, and implementing action taken all within 60 days of the date of request for a hearing. 7 C.F.R. Section 271.1 (0)

Setting time limits, however, is not enough. Time limits will be nothing more than empty promises accompanied by a sufficient commitment of resources, and changes in the conduct of appeals.

2. *Resources and Organization*

Congress clearly has an obligation to make sure that the Bureau of Hearings and Appeals is provided with staff in sufficient numbers and of sufficient skills to handle its growing responsibilities. These hearings provide documentation for the fact that this has not been done so far. The costs of providing a prompt and fair adjudication system are small compared with the total costs for any of these programs. Budgetary constraints cannot and must not be a reason for failing to provide a prompt and fair hearing system.

We oppose certain procedural solutions which have been suggested to this committee. We oppose limiting the claimant's time for appeal as a way of lessening the volume of appeals. Although this would undoubtedly diminish the number of appeals, the appeals which would fall by the way would be the claims of the least assertive, least educated, and least informed claimants. In our experience, it frequently takes sixty to ninety days, particularly in rural areas, for a person to make his or her way to a helpful lawyer or counselor who can give assistance with an appeal. An individual should have at least ninety days to appeal an unfavorable decision at each level. (In this regard it is worth noting the government has 90 days to decide whether to review a favorable hearing decision whereas the individual has only 60 days to appeal an unfavorable decision to the Appeals Council.)

We also view with skepticism the proposals for an informal remand procedure fearing that, in a high proportion of cases, this would become merely one more source of delay. On the other hand we favor proposals for instituting face-to-face contact with the decision maker at a stage earlier than the hearing process. Our experience confirms what other witnesses have told you: A major reason for the high reversal rate at the hearing stage is the fact that the hearing is the one time in the whole adjudication process where the claimant actually gets to meet and talk with the person who will decide whether or not he is disabled. It would be beneficial from everyone's point of view for the exchanges of information which can happen only during this process to occur at an initial stage of the claims procedure as well as at the hearing.

In addition to the procedural suggestions which have already been made to you, we have some proposals about the Appeals Council and about lawyers.

Particularly in recent months delays at the Appeals Council stage have been nearly as long as delays at the hearing stage. Our information indicates that this is largely because of the *de novo* review provided in many cases by the Appeals Council. *De novo* review is an inappropriate function for the Appeals Council since nearly all claimants and their attorneys are financially unable to make a personal appearance in Arlington. Furthermore, the interests of the claimant which are presently served by the willingness of the Appeals Council to consider new or additional evidence could be better served by a remand to the administrative law judge who handled the case.

Congress should bar the Appeals Council from any on-motion review of favorable hearing decisions. On-motion review is an inherently unfair procedure. At no other stage of the administrative process is a decision in the claimant's favor subject to review. The Appeals Council's on-motion review confuses the functions of quality control and adjudication. Certain cases are subjected to more careful scrutiny than others leading to very uneven application of on-motion review. Particularly where the Appeals Council takes upon itself the function of soliciting additional evidence which is likely to be unfavorable to the claimant, on-motion review puts the Appeals Council in the position of acting as both judge and prosecutor. Even in the majority of cases where there is no on-motion review, the ninety day period granted to the Appeals Council to decide whether to review a case means an additional three-month delay before payments can be initiated following a favorable hearing decision.

The proper function for the Appeals Council is to review hearing decisions, to make sure they are consistent with the law and are not arbitrary. It could serve a valuable function by issuing precendential decisions which would produce a unified body of agency policy. Its involvement in *de novo* review is a wasteful and unnecessary function.

As you have already been told, the number of cases with attorney involvement is increasing. There is a widespread belief among our members that private attorneys are often responsible for foot-dragging because this is a way of increasing their fee. You should review agency policies for awarding attorney fees to make sure that there are no financial incentives to the attorney in delay. The amount of the award should be immaterial to the attorney's fee, since this is nearly always a function of the extent of delay and not the attorney's skill or effort. In light of the seriousness of the problem of delay, agency policies for awarding fees should reward attorneys who manage to get a claim adjudicated promptly.

3. *Redress in Case of Delay*

One of the worst aspects of the delay problem is the fact that the individual applicant has no recourse and must bear the full burden of the costs of delay. In effect a claimant whose benefits are not approved until the hearing or Appeals Council stage makes an interest-free loan to the U.S. Treasury for 2 or 3 years, while, at the same time, borrowing at commercial rates to pay his family's bills. Delayed payments in commercial transactions are accompanied by the payment of interest. Disabled workers should be treated as well. The Social Security Act should be amended to provide for interest to be paid on every award calculated from the date of eligibility. While this could not fully compensate the claimant and his family for enduring many months without income it would at least remove the government's financial advantage in delay.

Earlier in this statement we explained our opposition to on-motion review by the Appeals Council. If, however, this practice is not abolished, at least payments should be initiated immediately following a favorable hearing decision and should continue pending Appeals Council review. We represent a number of claimants for black lung benefits who received favorable decisions from the administrative law judge as long ago as the summer of 1974 but have not yet received a cent because their claims are still being reviewed by the Appeals Council. A claimant who has persuaded an administrative law judge that he is entitled to benefits should not have to endure additional months without benefits.

Finally we favor amending the Social Security Act to provide that payments should begin if a hearing decision is not rendered within the required time limits, and should continue until a hearing is held. While undoubtedly this would result in temporary payments to some ineligible persons, the alternative is the current situation where the disabled person pays the costs of governmental inefficiency.

The goal, of course, is elimination of delay. But, in the meantime, it is time for Congress to act to lay the burden of delay somewhere besides upon the disabled worker.

STATEMENT OF HOWARD I. GROSSMAN, DECATUR, GA.

My name is Howard I. Grossman. I am an Administrative Law Judge with the Social Security Administration. My remarks are based not only on my own experience, but also on valuable suggestions from other ALJs in HEW, including Judges Leonard E. Baloun, of Spokane, Washington; Richard L. Edgerton, of Omaha, Nebraska; Paul Harke, of Dallas, Texas; Robert L. Hermann, of Manchester, New Hampshire; Thomas J. Pope, of San Rafael, California; Harvey Schwartz, of Denver, Colorado; Robert B. Murdock and Fletcher B. Watson, IV, both of Roanoke, Virginia, and many others.

It has been said that the subject of these hearings should be the "disability" crisis, not the "appeals" crisis. I agree. In order to clarify the matter, allow me to use military terminology for a moment.

The Administration has an army of over 10,000 people to handle the disability crisis. These figures come from the Committee's staff report of 1974—to be specific, Table 3, page 134; page 137; Table 4, page 149; Table 7, page 152; and Table 16, page 162.

The Army is composed of three Army Corps—First Corps consists of about 5,000 State Agency employees, Second Corps is composed of about 3,500 employees, or 3,500 "man-years" in the Bureau of District Office Operations (BDOO); while the Third Corps, the Bureau of Disability Insurance (BDI), has a fluctuating Table of Organization which at one time went as high as 6,000.

Off on a hill to the left, held in reserve, the Administration has a light brigade of 440 Administrative Law Judges.

The Army's mission is, first, to find the facts, and, second, to pay meritorious claims. Specifically, it is supposed to receive applications, conduct an "intake" interview, acquire medical information, order a medical examination of the claimant when needed, ascertain the claimant's age, education, and working experience, ascertain whether the claimant's current work constitutes "substantial gainful activity", determine whether the claimant meets the special insurance requirements of Title II of the Act, make initial and reconsidered determinations as to whether the claimant meets the disability requirements of the Act, and provide federal review of these determinations.

This Army is in full retreat! It has been defeated by the facts, and has failed to perform its assigned mission. In 1974, the Commissioner of Social Security appointed Gerald L. Boyd, of Social Security's Office of Administration, as a kind of Inspector General to investigate the disaster. He brought together a task force of 16 top administrators from Social Security, and reported the following:

(1) Long delays in the processing of claims, with "400,000 folders . . . out of file at any given time".

(2) Incomplete, uncoordinated, and contradictory instructions. A direct quote from the Boyd report states: "The proliferation of instructions from all sources within SSA has resulted in confusion, conflicts, overlapping, and duplication that seriously strain our ability to administer the SSA programs effectively."

(3) Deterioration in the quality of the initial interview. Direct quotes from the report read as follows: "Changes in the disability process have reduced the requirements for a detailed, impairment-related initial interview and placed much of the data gathering later in the process . . . Training in medical vocational criteria has become virtually nonexistent except for a few regions . . . State agency (SA) and hearings personnel complain that information gained by the initial interview provides little help to them and that it does not give the claimant an adequate understanding of the medical/vocational requirements of the law."

"The rationale for the denial . . . is quite limited and most often the interviewer is not conversant with the implications of the rationale. There appears to be some validity to the argument put forward by the ALJs that they are the first SSA employees who have an opportunity to treat with the 'whole man' in his environment. It is of real concern that this opportunity occurs late in the process . . ."

(4) Mr. Boyd reports "a very complex case flow which makes processing a claim to payment or denial very difficult and can turn attempts at folder retrieval into a frustrating and . . . nonproductive exercise".

(5) These difficulties are also found in the SSI program. There is lost productivity because of lack of a "clear definition of the system, what it can and cannot do, and absence of training, systems, and procedures".

Mr. Boyd strongly urges remedies "directed at reaching a correct and timely decision at the earliest possible time in the process". He also recommends regulations concerning disability criteria, with priority given to medical/vocational factors.

I am submitting a copy of the Boyd report to be entered into evidence in this proceeding. Although the Commissioner has not yet adopted or rejected the draft report, there can be no doubt that its factual findings are based on actual investigation and visits to SSA district and State Agency offices by the Administration's own task force.

The accuracy of the Boyd report is buttressed by testimony before the Subcommittee on September 26, 1975, given by various experts including former Commissioner Ball.

The Administration's deficiencies in these matters have a long history over many years, which are detailed on pages 45–50 of your staff's report of 1974. I request that that report also be entered into evidence in these proceedings. As the Committee's staff has observed, the collection of evidence at the State Agency level is steadily shrinking—medical examinations of claimants have dropped from 40 percent to 20 percent in recent years (Staff report, pages 104, 154–162, 226–227).

At one time, in 1970–1971, the Administration tried to find out what it *would* be like to consider "the 'whole man' in his environment". It conducted a test of interviews with claimants at the reconsideration level. "A major objective of the study," the Administration informed your staff last year, "was to determine whether the interview procedure was effective in reducing the number of hearing requests." The Administration stated that the answer was negative, since the study showed "about the same national rate for hearing requests in both the control and interview groups", 39.7 percent for the personal interview group and 41.8 percent for the control group (Staff report, page 241).

There is an error in these statistics. It is imperative that this error be corrected, since it goes to the heart of one of the crucial reforms in H.R. 8018. I do not think that the Subcommittee can make appropriate recommendations if they are based on erroneous facts. I therefore request the Committee's indulgence for a moment to consider some statistics.

To illustrate this error, and for the sake of clarity, I will assume that there were 100 claimants in each group, the first group of 100 having personal interviews, and the other a control group. Both groups were denied benefits initially. The actual number of cases is greater in each group, but the use of the figure of "100" permits easier explanation of the error.

As the Administration states, about 41 percent of the control group, who received a second denial without an interview, asked for a hearing. As to the first group, which did have interviews, the true figure is a little under 31 percent, not 39.7 percent, as claimed. The true percentage comparison is 41 percent for the control group and about 31 percent for the personal interview group, about one-fourth less. In other words, when the claimants received personal interviews but were still denied at the reconsideration level, the reduction in hearing requests was about 25 percent.

How did the Administration arrive at its erroneous percentage of 39.7 for the personal interview group? First, after the personal interviews, about 20 out of 100 initial denials in the personal interview group were changed to allowances, leaving 80 cases still denied after reconsideration. The Administration's erroneous 39.7 percentage, of claimants who requested a hearing, is a percentage of these 80, not a percentage of the original 100.

This error appears on page 241 of the Committee's staff report, dated July, 1974, and is repeated on page 10 of the staff's recent Supplemental Report, dated September 17, 1975. Instead of dividing the *total number of cases considered* into the number of claimants requesting hearing, the Administration first subtracted the number of denials changed to allowances. In other words, the Administration's statistical argument seems to be, before testing the efficiency of face-to-face interviews, we first want to disregard the cases where it was successful Thus, if we throw away the success of SARIS (face-to-face interviews), the results are about equal! This is like arguing that the only reason Secretariat won the Kentucky Derby is the fact that he ran faster than the other horses.

The relevant inquiry is to determine, *from the total number of cases considered* in the interview and no-interview groups, what percentage went to hearing in each group. For the no-interview group, we divide the total cases, 584, into the number of hearing requests, 241, and obtain a percentage of about 41.2. This is almost the same as the 41.8 percent which the Administration reaches. The reason is that the usual no-interview reconsideration is unsuccessful in ascertaining meritorious claims—only 8, or 1.3 percent, were detected in the SARIS test.

We now use the same process with the interview group—start with the total number of cases considered. We are faced at the outset with a mistake in simple addition—the total is 691, not 671. This can be seen in the left hand column of the first table on page 241 of the Committee's 1974 staff report. Dividing 691 into the number in this group who went to hearing, 214, results in about 30.9 percent—about one-fourth less than the 41 percent in the no-interview group. In sum, SARIS shows that a personal interview alone—without the additional provisitions of H.R. 8018—will reduce hearing requests by about 25 percent.

The actual test results show additional benefits. In the first place, as I have noted, about 20 percent of the claimants who *were* entitled to benefits received them at the reconsideration level without being forced to go to hearing. In addition, of those claimants who did go to hearing despite a reconsidered denial, the ALJs reversed the denial and granted benefits in only 22.2 percent of the cases, although the national reversal percentage then was 37.2 percent. This shows that the ALJs had substantially less error to correct where the claimant had received a face-to-face interview.

Despite these favorable test results in 1970–71, the Administration did not implement this reform.

If this reform alone had been instituted, the current "backlog" would be about one-fourth less. The additional reforms provided for in H.R. 8018 would have resulted in additional reductions in substantial amounts.

The Administration now states, 4 years after SARIS, that it is again "experimenting" with the procedure. Gentlemen, the claimants waiting for hearings are not experiments! What is needed is action now, not a prolongation of this deficiency into the indefinite future! This is no time to wait. The machinery is at hand. As your staff's recent Supplemental report shows, the overwhelming number of the State agencies favor SARIS (Staff Supplemental Report, September 17, 1975, page 11).

Before turning to the ALJs and the hearing level, let me say a word about federal review of these State agency determinations, supposedly conducted by BDI.

At the same time that the investigative work of the district offices was being reduced, the Administration was also reducing its review of these determinations. Although it formerly conducted a 100 percent review, beginning in about 1971 it went to sample review. Only 5 percent of initial determinations and 10 percent of reconsidered determinations are now being reviewed. Moreover in SSI cases this review is not made until after the decision is effectuated, thus inhibiting any change of decision. This means that the inadequate determinations at the lower levels are receiving only perfunctory review by BDI. As a result, the State agency errors in 90–95 percent of the cases, which were formerly being corrected by BDI, are now being passed on to the ALJs.

Of course, there is no way that the ALJs can correct the erroneous allowances, which are never reviewed and which never reach the ALJs. As your staff has observed, the "statistics indicate an alarming number of deficiencies in development of allowance cases and the distinct possibility that a rather large number of individuals are coming on the rolls who may not meet the standards of the law." The staff also noted that the shift to sample review was "tantamount to amendment of the statutory scheme . . ." (Staff Report, page 7). To the extent that the trust fund is thus being endangered, this only places the rights of truly disabled claimants in jeopardy.

In sum, to return to my military analogy, the third, corps, BDI, has completely abandoned its statutory obligations, and has placed the rest of the Army in grave danger.

And what has been the response of the Administration to the collapse of its Army? How does it plan to correct the leaderless chaos in which the 10,000 now find themselves? The answer is—nothing. As the errors of the 10,000 descend upon 440 ALJs, the Administration can only turn its back on the Army, and exhort the light brigade to ever greater effort. Some one has blundered, but the Administration can only say, "Forward the light brigade!"

You have asked, Mr. Chairman, why the Social Security Administration and the Civil Service Commission cannot settle their differences, hire enough judges to take care of the "backlog", and end the problem. Mr. Trachtenberg and Mr. Cardwell say that one of the problems is concurrent cases, SSA and SSI, which can only be heard by ALJs. H.R. 8911 attempts to solve the problem with non-APA hearing examiners appointed by the Secretary for a supposed "temporary" period.

None of these proposed solutions meets the real problem. I submit that it is unrealistic to assume that 440 ALJs can correct the errors of the 10,000. Mr. Trachtenberg himself has stated that the judges should adjudicate, not investigate, and I submit his memo to this effect and ask that it be entered into evidence in these proceedings. Among other things, an investigation by Mr. Trachtenberg early this year found that as many as half of the cases now at the hearing level either were not ready for hearing, or did not require a hearing because an allowance could be made on the record. On Mr. Trachtenberg's authority, the alleged "backlong" at the hearing level is almost cut in half.

The Administration has recently come forward with half-way solutions, which in reality are steps backward. There has been reference in these proceedings to something called "informal remand." The procedure is misnamed—it is actually a recall of a case, pulling it away from an ALJ. It works like this:

Once a claimant becomes sufficiently unhappy with his run-around at the lower levels, and files a request for hearing, the Administration is suddenly spurred to intensive activity. It reviews the case, and may even gather more evidence. The district office is authorized to pull a case back from an ALJ, and delays of up to 90 days are permitted for the additional review. At the same time, a prescribed form letter tells the claimant, erroneously, that there will be no delays because of the additional review. I submit a copy of SSA Disability Insurance Letter No. II-59, BDI Pub. No. 037-73, and ask that it be received in evidence.

Why is it, Mr. Chairman, that the Administration is spurred on to this activity only after the claimant files a request for hearing? Why isn't every taxpayer entitled to full investigation and equal justice at the reconsideration level? Why is it that the more litigious claimant gets benefits, while the taxpayer who is exhausted by these procedures goes home, unrewarded, to his pain and misery?

The Commissioner suggested that it might be more expensive, and more claims might be paid, if every case were fully investigated at reconsideration.

I submit, Mr. Chairman, that this Subcommittee should demand that every taxpayer get full and fair treatment at the reconsideration level. He has already been denied once, and still insists that he is disabled. It is a mockery of justice to hustle the claimant through a phony reconsideration, and then give him his rights only after he files a hearing request.

A claimant who is dissatisfied has a right to a prompt hearing before a fair and impartial ALJ. "Informal remand", actually "recall", denies him this statutory right.

It may well be that more just claims will be paid by this procedure, and will thus tend to increase the cost. However, there would be more than enough money to pay these just claims if the Administration would stop throwing away hundreds of millions of dollars in unreviewed initial allowances, to persons who are not disabled. The supreme irony of the Administration's position is that it gives money to people who are not entitled to it by law, and denies payment to individuals who are so entitled.

Now, with all this, the members of this Subcommittee have demanded a plan that will dispose of the 107,000 case "backlog" which is now in BHA, irrespective of how it got there in the first place. I will now submit a plan. It is simple and will result in a dramatic rise in case production utilizing the present corps. It starts with the reforms *below the hearing level*, which are set forth in H.R. 8018, and adds 3 additional reforms *at the hearing level*: (1) give every ALJ, rather than a few, adequate staff support; (2) grant the ALJ discretionary authority to issue oral decisions on the record, and (3) provide the ALJ with true remand authority to send the case back to the State Agency for further investigation, thus saving the time of the ALJ for adjudication rather than investigation.

Starting first with adequate staff support, the simple undisputed fact is that a judge cannot issue any decisions without clerical support, office space, and office equipment. Of course, I suppose that most judges are capable of opening mail, filing papers, and answering the telephone. A few might even be able to type a decision. By and large, however, a judge without a supporting staff and equipment is a judge who issues no decisions. And the more such support he has the more decisions he issues.

What does the supporting staff have to do? I will not take the time of the Subcommittee to enumerate the duties, except to say that they are numerous and constantly growing. They fall into 3 time periods—pre-hearing, hearing, and post-hearing. Attached to the printed copy of my remarks is an appendix listing these duties.

The Administration's response over the years to these clerical needs has been grudging. In most cases it has maintained a two-to-one ratio, that is, one hearing assistant and one secretary for each ALJ. This two-to-one unit has been capable of producing about 15 decisions per month. Mr. Trachtenberg has added some secretaries and legal assistants in recent months, and average production has risen to about 20. A few ALJs have exceeded the average by considerable amounts. There is no accurate way to assess all the reasons for this. Of course, some judges are more able than others, and there are individual differences—some write more decisions of lesser quality, and other write less decisions of better quality. However, other factors are also important, such as the reversal rate. The Bureau permits a reversal, or allowance, to be written on a "short form" with a supporting memorandum. An affirmation of a prior denial, on the other hand, may be subjected to judicial review, must be detailed and well-articulated, and is, therefore, much more difficult and time-consuming. A judge with a high reversal rate can thus turn out more decisions.

Finally, some ALJs, for one reason or another, have had more clerical support than other judges, and have thus been able to decide more cases. Although all the reasons for disparate staff support are somewhat obscure, the principal reason appears to be the Administration's view that additional staff support is a "reward" to be given only to a small number of "big producers", rather than to the entire corps. This is erroneous policy. Since the great bulk of total decisions is turned out by the large number of "average producers", increasing *their* decisional capacity, as well as that of the few "big producers", is mandatory in order to achieve the greatest possible increase.

Let us hypothecate a unit with a 5-to-1 ratio, consisting of 2 hearing assistants, 2 secretaries, one legal assistant, and one ALJ. One secretary and one hearing assistant would form a sub-team, with two such sub-teams in each unit.

At present, the ALJ is assisted at the hearing by his one hearing assistant. The hearing assistant is thus required to attend every hearing, and cannot at the same time prepare other cases for future hearing. Under the proposed plan, the sub-teams would alternate on cases. That is, during one week, the hearing assistant from Sub-team 1 would attend the hearings, while the other hearing assistant would be preparing future hearings. Both secretaries would be engaged in the multitudinous duties described in the appendix, including the typing and releasing of decisions.

Before describing the operations of such a unit, let me say a word about the necessity for authority to issue oral decisions. Until recently, the Appeals Council subjected *all* decisions to review upon the filing of a petition by the claimant, or upon its own motion. Thus, where the ALJ had issued decision favorable to the claimant, the Appeals Council might review the case on its own motion and reverse the ALJ, thus denying the claim.

Recently, however, the Appeals Council has ended "own motion" review, and favorable ALJ decisions are now sent directly to the payment center. This means that no one ever reads a favorable decision, except the claimant, his lawyer, and the payment center—and even then they only read the bottom line, or final decision. The ALJ's written rationale in the short form memorandum is forever consigned to limbo.

The APA does not require a *written* decision—merely a decision based on the record. The ALJ's reasons for the allowance *are* on the record—a tape or disc—and may be transcribed if needed. Why then require the ALJ to prepare a written decision which no one ever reads? As short as the short form memo may be, the combined operations of ALJ dictation, secretarial typing, and review by the ALJ, take 1 to 2 hours. This is time in which the ALJ and his unit could be holding a hearing and issuing another decision. In sum, authority to issue oral decisions, plus adequate staff support, would *double* the ALJ's capacity to issue favorable decisions.

Although most denials would continue to require a well-articulated written decision, even some of these could be oral—as, for example, where the hearing clearly establishes that the claimant has engaged in substantial gainful activity since the alleged onset of disability, and thus cannot be found to be under a disability.

In addition, the ALJ should have discretionary authority to remand cases to the appropriate SSA component, for necessary case development. The reforms in H.R. 8018 will undoubtedly reduce the flood of undeveloped cases to a trickle. Nonetheless, true remand authority in the ALJ will assure that the ALJ's time is spent in adjudication rather than investigation.

Let us now turn to the first week of hearings with our hypothetical unit. Sub-team 1 has previously done all the work necessary to arrange for these hearings, and they are attended by the hearing assistant from Sub-team 1. They are also attended by the legal assistant, at the ALJ's discretion.

About 10 hearings are scheduled for the week. The time for each hearing varies according to the complexity of the case, and the individual differences of the ALJ's. A clear-cut reversal can be over in 15 minutes, while a complicated case, with attorney representation and numerous witnesses, may take 2 hours, perhaps longer. The *average* hearing time is not more than 2 hours, and I will use this figure.

Ten hearings in the first week will take aobut 20 hours or half a 40-hour week.

Let us assume 3 hearings are scheduled for Tuesday, beginning at 9:00 A.M. The first case is a clear-cut reversal, and is over in 15 minutes. The ALJ announces the reasons for the allowance on the record, and the hearing assistant enters the formal findings of fact and conclusions of law, required by the APA. on a pre-printed form with a "Notice of Entry of Judgment." This is mailed the same day to the payment center, and the claimant starts getting his money immediately.

The second case is long and complicated, with a voluminous file of contradictory medical evidence, and witnesses whose veracity is suspect. The ALJ concludes that the claimant is not disabled. At the conclusion of the hearing, after the claimant has departed, the ALJ goes over the reasons for his decision with his legal assistant, who has been brought into the hearing by the ALJ. They discuss the case at a time when it is fresh in their minds. The ALJ instructs the legal assistant to start preparing the decision, beginning with careful sumaries and analyses of the contradictory evidence.

Under current reversal averages, with a reversal rate of 50 percent, about half of the hearings in the first week will result in oral reversals, which require no post-hearing work. The SARIS test shows that enactment of H.R 8018 and implementation of its procedures will reduce the ALJs' reversal percentage (allowances) to a little over 20%. Thus, of the 10 scheduled cases in the first week, about 2 or 3, on the average, will be reversals, leaving 7 or 8 denials to be written by the legal assistant, pursuant to the ALJ's supervision and review, and by the ALJ himself. This is a realistic goal for 2 decision writers in the 20 hours remaining in the week.

As a result, about 10 decisions per week can be produced by a hearing unit with a 5-to-1 ratio, or, using a month of 4⅓ weeks, over 40 decisions per month. Some ALJs have achieved these and greater figures with adequate staff support.

As I suggested, the 5-to-1 ratio is hypothetical, and may vary from one ALJ to another. Some ALJs may produce less decisions, and others will undoubtedly produce more .This is what individual differences and averages are all about. As the Bureau Director has stated here, rigid production goals for judicial decisions are not appropriate. The dispensation of justice is a matter which ultimately rests with the coincidence of each individual judge. The adjudication of cases cannot be likened to production on an assembly line, turning out canned peaches by the box—particularly where, as in Social Security's pre-hearing procedures, the production line itself has broken down.

Except for secretaries, almost all the personnel for this staff expansion are already aboard, but are not being utilized in the proper manner. Many additional hearing assistants can be found in the "development centers", where "hearing analysts" are supposed to "develop" cases. For a number of reasons—a principal one being that the hearing analyst is not responsible to the ALJ whom she is supposed to be serving—the "development center" experiment has been unsuccessful. The hearings analyst should be transferred to the staffs of the ALJs, as hearing assistants. Since hearing analysts are classified at grades GS 9–11, while hearing assistants doing comparable work are rated no higher than GS–8, this inequitable disparity should be eliminated by raising all such personnel to the same level.

Legal assistants may be found in the ranks of 200 disability examiners in BDI who became "extinct" on the implementation of sample review, according to the Committee's Staff report of 1974. They have not been terminated, as far as we know. What are they doing? They would undoubtedly provide an excellent source of legal assistants for the ALJs.

A grade of GS–14, not less than that which these individuals are now receiving and in some cases more, should be offered. It is my understanding that the Administration pays "professional analysts" at the GS–14 rate.

The same rate is appropriate for the ALJ's legal assistant. The Committee should make certain that the Civil Service Commission deems this to be qualifying experience for placement on the register.

It is not my purpose to argue that these are the only groups from whom legal assistants may be selected—the Bureau Director's utilization of law school graduates for this purpose is excellent. I merely wish to point out that there are various sources for legal assistants.

Existing SSI and Black Lung examiners who have not yet qualified on the Civil Service register would also provide an excellent source for legal assistants. In doing so, they would suffer no reduction in grade, and could be promoted upon certification and selection.

What are the advantages of this procedure as compared to others? Why not hire more ALJs, or "grandfather" in the SSI and Black Lung examiners, and retain the 2-to-1 ratio? Because two traditional hearing units, with the 2-to-1 ratio, cannot produce any more decisions than 1 unit with a 5-to-1 ratio and authority to remand cases and issue oral decisions. There is no good reason for a system which expands the ALJ corps needlessly, a subject of great concern, as indicated in the staff's supplemental report. It should also be observed that the 6 persons in a 5-to-1 unit would have only ALJ, as compared to 2 ALJs in 2 units with 2-to-1 ratios—accordingly, the larger unit would be less expensive.

Although the Administration is hiring secretaries, they appear to be intended for new ALJs, not to expand existing hearing units. Indeed, current Administration staffing levels, as set forth in Position Authorization Tables (PATs), demonstrate conclusively that the Administration still adheres to the traditional 2-to-1 ratio as an over-all pattern, but departs from that pattern in certain offices for unexplained reasons. Thus, there is a wide disparity in the staff-to-ALJ ratios among the various offices. I am submitting a currently dated group of these tables, together with a statistical analysis of them, and ask that these documents be received in evidence. Also enclosed is a copy of a memo from the Assistant Director of BHA, rejecting a Regional request for additional hearing assistants and scretaries, because the "explanations were too vague and did not adequately justify the additional positions." A recent memo from the Bureau Director authorizing a new hearing office with 8 decision writers states that the support staff will consist of 8 Hearing Assistants and 9 clericals, a total of 17, plus 2 law clerks. This is the basic 2-to-1 ratio.

It is clear that the Administration demands conformance with the PAT.

Among other things, the proffered documents show that only a token number of legal assistants have been assigned to ALJs. And even in those units where they are assigned, there is no additional staff to take care of the unit's increased decisional capacity.

Also submitted is a memo from an ALJ in charge of one of BHA's largest hearing offices. He summarizes current administrative policy by saying "that without additional staffing of support people . . . the Administrative Law Judge is being expected to do an impossible task . . . (A)ll are dedicated, competent Judges working more hours than they are paid. They do this out of concern for those worthy and needy claimants who without our efforts will literally starve."

Why not allow examiners appointed by the Secretary to hear Title II cases, as set forth in H.R. 8911? The Subcommittee already has abundant evidence from an impressive list of witneses who presented cogent reasons against any tampering with the APA. In addition to these reasons, I note a practical objection—the same production of decisions can be achieved by incorporating the examiner into a 5-to-1 unit, as a legal assistant. At the same time, the very great advantages of a full APA hearing will be preserved.

With respect to the comparability of the Civil Service and HEW examinations for ALJs and hearing examiners, a subject of contradictory testimony on the second day of the hearings, Mr. Dullea is supplying definitive evidence on this point. In addition, it is my understanding that about 500 applications were originally received by HEW in response to its publication of a hearing examiner position at the GS–14 grade. Of these, about 250 passed the test. However, when the offers were actually sent out to the successful applicants, the grade was reduced to GS–13. Only about half of those who had passed the examination agreed to take the reduced grade, and about 125 declined. Were the persons who declined more qualified than the individuals who accepted? We do not know on the evidence of record, and "grandfathering" will forever preclude us from knowing. Further, the Administration's argument that the Civil Service Commission refuses to supply ALJs—an argument set forth in the proposed "Committee Report" on H.R. 8911—is belied by the fact that CSC has just supplied 50 names from the register.

A taxpayer is entitled to more than a fair hearing and an independent judge—he is entitled to the very best judge the government can supply. Why should these rights be compromised in the name of expediency, if there is in fact nothing expedient about the compromise?

Mr. Trachtenberg stated that part of his ALJ problem is geographical, that is, he cannot get ALJs to agree to go to BHA offices in particular cities. He mentioned Lansing, Michigan. The reason that BHA is having this trouble is the fact that it pays a substandard wage. There is no reason why an ALJ should go to Lansing for GS–15 pay if he can get a GS–16 rating elsewhere. This is the reason that Social Security ALJs regularly depart from the agency for higher paying jobs elsewhere. This fact may be found in the records of the Civil Service Commission, and there is testimony to this effect from a disinterested witness on the second day of these hearings.

The Social Security ALJs are actually used as a hiring pool for other agencies. The expense of recruiting and training judges for other agencies is paid for by Social Security taxes, which is hardly the use that Congress intended for them.

The comparability in difficulty of the ALJs' work in SSA with that of the other agencies has been well documented by various studies, including evidence obtained by the House Post Office and Civil Service Committee (the Hanley Subcommittee, see testimony of the Honorable Frank B. Borowiec). Professor Popkin, an authority in the field, has written that the difficulties of the job alone justify a GS-16 grade. Mr. Dullea himself has written that the functions of the ALJs throughout the government are essentially the same (see Administrative Law Review, Winter 1973, Vol. 25 No. 1, at page 42).

The Subcommittee's staff has tacitly admitted this on page 18 of the Supplemental Report. The only adverse comment reported by the staff is that "some would argue" that Congress should not be in the job classification business.

But H.R. 8018 does not reclassify the ALJs because of the equities alone. The evidence shows that the substandard wage of the ALJs is one of the major reasons for the backlog. No manager can get maximum results with constant turnover of personnel—and the ALJs in Social Security are going in and out through a revolving door.

Since the backlog is the express concern of this Subcommittee, the Subcommittee is thoroughly justified in recommending reclassification of the ALJs to GS-16 as a necessary step to eliminate the problem.

The impact of all these reforms upon the "backlog" would be swift and incisive, entirely apart from other emergency measures which are possible. The recommended procedures at the hearing level would be almost double the decisional capacity of the existing ALJs. The reforms below the hearing level, which are mandated by H.R. 8018, would provide speedier justice to deserving taxpayers and substantial reduction in the cases going to hearing.

Considered in combination, the recommended reforms would provide a dramatic and immediate reduction of the backlog, and an assurance that it would not return.

Of equal or greater significance is the fact that this can be done with full protection of the taxpayers' rights under the APA. The argument of some witnesses before this Subcommittee, that due process of law is incompatible with large caseloads, is erroneous. The Subcommittee has been presented with a false dichotomy—that it must choose between justice and expediency. On the contrary, modern casehandling techniques permit careful and conscientious scrutiny of individual cases, which is the hallmark of the judicial process, without resort to computerized justice. Surely, this is the route which this Subcommittee should follow, rather than one which would lead us into the deep and dangerous waters which the APA is designed to avoid.

I thank the Subcommittee for its time and patience.

APPENDIX

DUTIES OF HEARING ASSISTANTS AND SECRETARIES

The duties of an ALJ hearing unit prior to hearing under present procedure, include the following: (1) examination of files to determine issues, whether the case is properly at the hearing stage, and the possibility of a favorable decision on the record; (2) pulling, stamping, and numbering exhibits, typing exhibit list, and establishing exhibit file; (3) checking names of all doctors, and making copies of their medical qualifications from medical directories; (4) following up on all doctors' reports indicated but not in file; (5) checking possible hearing dates and availability of hearing rooms; (6) if hearing is out of town, arranging hearing space, hotel accommodations, and travel plans (air or government cr); (7) arranging for presence of vocational experts where required and, occasionally, medical advisors; (8) acquiring consent of attorneys to hearing date, and rescheduling hearings when a newly appointed attorney shows good cause for delay; (9) preparing and mailing notices of hearing and letters to expert witnesses; (10) preparing photocopies of the exhibits and mailing same to the expert witnesses and attorneys; (11) checking instructions to attorney on preparation of fee petition; (12) scheduling cases so that the oldest is heard first; and (13) ascertaining the existence of adverse parties, and, if any, mailing them notices.

At the hearing, the hearing assistant sets up the recording equipment, opens the record with a statement of the case, receives the claimant, explains the hearing process, shows the exhibits, and obtains signatures on necessary forms. During the hearing, the hearing assistant makes extensive notes of the testimony, operates the recording machine, and posts a hearing log. If the recording equipment breaks down, the hearing assistant must be able to substitute with a shorthand record.

After the hearing, the hearing assistant or secretary (1) posts a control card showing hearing date and other data; (2) adds new exhibits to file and exhibit list; (3) transfers hearing log notes to cassette envelopes; (4) checks file and hearing notes for post-hearing development, including follow-up to doctors, hospitals, and employers; (5) arranges with a State agency for consultative medical examination where indicated; (6) types and mails interrogatories to vocational experts and medical advisors where required; and (7) sends copies of new exhibits to claimants' representatives; (8) prepares duplicate files in concurrent cases; (9) prepares computer cards.

In addition, routine duties include preparation of vouchers for the hearing unit and expert witnesses, the filing of various reports, the preparation of dismissals when indicated, and summaries of medical evidence and testimony at hearings.

The above activities take place disconnectedly with respect to at least 100 cases on an ALJ's docket. A considerable part of each day is spend answering telephone calls—from claimants, congressional offices, BHA's central office, and district offices. A record of each call must be made.

Incoming mail is voluminous—additional evidence, letters, new regulations and circulars. All must be filed.

Transcripts of hearings must be prepared about six times per year, and take precedence over all other activities, except for numerous and necessary interruptions. The typing of decisions is a full-time job, and is followed by preparation of the notice of decision, copies to representatives, and the actual mailing.

In addition to the foregoing duties, unit members receive other duties, such as checking in supplies, and answering the front office telephone.

STATEMENT OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, thank you for the privilege of presenting to this distinguished Subcommittee the views of the Veterans of Foreign Wars of the United States regarding Social Security hearings and appeals.

My name is Donald H. Schwab and my title is director of the National Legislative Service of the Veterans of Foreign Wars of the United States.

The voting delegates to the 76th National Convention of the Veterans of Foreign Wars, held in Los Angeles, Calif., August 15–22, 1975, and representing our 1.8 million members, adopted Resolution No. 308, entitled, "Eliminate delays in Social Security Hearings," the content of which follows:

"Whereas, delays in excess of 10 months in securing a hearing on a disallowed decision regarding Social Security Disability Insurance Benefit, are being imposed on our veterans; and

"Whereas, there are not sufficient Administrative Law Judges in the Department of Health, Education, and Welfare to reduce the backlog of cases and keep reasonably current; and

"Whereas, these aforementioned conditions contribute to the further deterioration of the financial position of veterans and others: Now, thereofre, be it

"*Resolved, by the 76th National Convention of the Veterans of Foreign Wars of the United States,* That we work to have the Department of Health, Education, and Welfare:

1. Add enough law judges to hear the tremendous backlog of cases in certain geographical areas of the United States.
2. Assign traveling judges to the areas where hearings have a waiting period of 4 months or more.
3. Urge the acceleration of hearings on terminal cancer cases not to exceed 30 days and 90 days on other cases following disallowal, so the decision will be made before the death of the appellant.
4. Create joint studies within the Department of Health, Education, and Welfare; the Bureau of Hearings and Appeals of the Social Security Administration to more realistically schedule hearings within a period of not more than 30 days for terminal cancer cases and 90 days for other cases, following a disallowed reconsideration."

The above resolution was prompted by frustrations caused by the inordinate length of time it is presenlty taking to resolve appeals to the Social Security

Administration. Our V.F.W. Services Officers, who gratuitously represent such claimants in all states, attribute delays of 1 year or more, primarily, to the critical shortage of administrative law judges. The thrust of our resolution addressing this problem is especially directed at the most unfortunate delay in processing terminal cases.

The Veterans of Foreign Wars was particularly pleased to read in your Committee Print, entitled, "Background Material on Social Security Hearings, and Appeals" that the Social Security Administration has, or soon will, instituted the following procedures to reduce the hearing backlog:

1. Allocation of additional support staff to backlogged hearing field offices.
2. Appointment of permanent assistant chief administrative law judges in all regions.
3. Creation of a strong hearings management capability.
4. Creation of a hearings staff attorney support program to assist individual presiding officers.
5. Assignment of trained analysts from central office to hearing offices on a temporary basis.
6. Acquisition of more sophisticated equipment by the Bureau of Hearings and Appeals for recordkeeping/processing purposes.
7. Counseling program in improved judicial techniques modeled after the Federal court system for low producers.

Notwithstanding the foregoing, we are convinced increasing the number of administrative law judges is the real answer to this problem in the final analysis. In addition, we further believe a system of readily identifying terminal cases should immediately be instituted and those cases be advanced to the top of the docket at all levels of consideration.

The Veterans of Foreign Wars of the United States appreciates the deep concern of this subcommittee in holding hearings with a view toward resolving the present delay in the Social Security appeals procedure.

Thank you.

[Whereupon, at 3:30 p.m., the hearing was adjourned.]

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